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In The

Supreme Court of the United States

October Term, 1992

LOUIS EDMONDS, a minor by TANEIKA JAMES, mother and natural guardian, and TANEIKA JAMES, in her own right,
Petitioners,

vs.

THE WESTERN PENNSYLVANIA HOSPITAL, RADIOLOGY ASSOCIATES OF WESTERN PENNSYVANIA, P.C., NEAL B. SIMMONS, M.D. and HARVEY L. NEIMAN, M.D.,
Respondents.

LOUIS EDMONDS, a minor by TANEIKA JAMES, mother and natural guardian, and TANEIKA JAMES, in her own right,
Petitioners,

vs.

WYNNE COOPER, M.D.,
Respondent.

On Petition for Writ of Certiorari to the Superior Court of Pennsylvania

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether Pennsylvania's Wrongful Birth Statute set forth in 42 Pa. C.S.A. § 8305(a) deprives a woman of her constitutional rights to due process and equal protection as provided by the Fourteenth Amendment of the United States Constitution?

A. Does the enactment of the Wrongful Birth Statute at 42 Pa. C.S.A. § 8305(a), by the Pennsylvania Legislature, constitute "state action" through its infringement on a woman's right to make an informed choice concerning pregnancy?

B. Does the Pennsylvania Wrongful Birth Statute at 42 Pa. C.S.A. § 8305(a) withstand strict scrutiny and further any compelling state or governmental interests?

II. Whether conflicting federal opinions on the constitutionality of the prohibition of wrongful birth causes of action need to be clarified by the Supreme Court of the United States?

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OPINIONS BELOW

In the instant action, there are five official opinions delivered by other Courts. The first opinion was authored by the Honorable James H. McLean of the Court of Common Pleas of Allegheny County, Pennsylvania dated January 22, 1991 (*see* Appendix F, p. 27a). Judge McLean sustained Respondents/Defendants' Preliminary Objections to Petitioners/Plaintiffs' Complaint by finding that Pennsylvania's Wrongful Birth Statute, 42 Pa. C.S.A. § 8305(a) barred the claims asserted and withstood constitutional challenge.

The second opinion delivered in this case was of the Honorable David S. Cercone of the Court of Common Pleas of Allegheny County, Pennsylvania dated June 28, 1991(*see* Appendix E, p. 21a). Judge Cercone granted the remaining Respondent/Defendant Wynne Cooper's Motion for Judgment on the Pleadings and determined that 42 Pa. C.S.A. § 8305(a) has a rational basis designed to meet a legitimate state interest and thus was constitutional.

After the filing of a timely appeal and consolidation of the two cases, the Superior Court of Pennsylvania entered a judgment affirming the Orders of the lower court on April 30, 1992 (*see* Appendix C, p. 5a). In an opinion written by the Honorable John P. Hester, the Superior Court upheld the constitutionality of Pennsylvania's Wrongful Birth Statute, 42 Pa. C.S.A. § 8305(a). A concurring opinion was filed by the Honorable Donald E. Wieand (*see* Appendix D, p. 6a).

Petitioners filed a timely Petition for Allowance of Appeal with the Supreme Court of Pennsylvania. On January 6, 1993, a Per Curiam Order was entered denying the Petition (*see* Appendix E, p. 21a). Lastly, on February 12, 1993 the Supreme Court of Pennsylvania entered a second Per Curiam Order denying Petitioner's Application for Reargument (*see* Appendix A, p. 1a).

STATEMENT OF JURISDICTION

Jurisdiction over the instant action is vested in the Supreme Court of the United States pursuant to Rule 10.1(b) and (c) of the Rules of the Supreme Court of the United States and 28 U.S.C. § 1254. The Petitioners seek review of the Order of the Supreme Court of Pennsylvania dated January 4, 1993 denying the Petition for Allowance of Appeal and the Order of the Supreme Court of Pennsylvania dated February 12, 1993 denying Petitioners' Application for Reargument. Petitioners ultimately seek review of the Order of the Superior Court of Pennsylvania dated April 30, 1992 which affirmed the lower Court's dismissal of petitioners' causes of action.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

I. 42 Pa. C.S.A. § 8305 provides as follows:

> (a) Wrongful birth – There shall be no cause of action or award of damages on behalf of any person based on a claim that, but for an act or omission of the defendant, a person once conceived would not or should not have been born. Nothing contained in this subsection shall be construed to prohibit any cause of action or award of damages for wrongful death of a woman, or on account of physical injury suffered by a woman or child, as a result of an attempted abortion. Nothing contained in this subsection shall be construed to provide a defense against any proceeding charging a health care practitioner with intentional misrepresentation under the act of October 5, 1978 (P.L. 1109, No. 261), known as the

> Osteopathic Medical Practice Act,1 the act of December 20, 1985 (P.L. 457, No. 112), known as the Medical Practice Act of 1985, 2 or any other act regulating the professional practices of health care practitioners.
>
> (b) Wrongful life – There shall be no cause of action on behalf of any person based on a claim of that person that, but for an act of omission of the defendant, the person would not have been conceived, would or should have been aborted.
>
> (c) Conception – A person shall be deem to be conceived at the moment of fertilization.
>
> 1988, April 13, P.L. 336, No. 47, Section 2, imd. effective.

II. The Fourteenth Amendment in pertinent parts provides as follows:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On or about June 8, 1988, Petitioner Taneika James, a teenager, learned of her pregnancy and obtained treatment from Respondent Wynne Cooper, M.D. On or about October 25, 1988, a sonogram ordered by Respondent Cooper was performed upon Petitioner James through Respondents Radiology Associates of Western Pennsylvania, P.C., Neal B. Simmons, M.D. and Harvey L. Neiman, M.D. at Respondent The Western Pennsylvania Hospital (*see* Appendix D, p. 7a).

Petitioners believe this sonogram clearly revealed an abnormality in the fetus which ultimately would require substantial medical care throughout the life of the later born child. Information concerning the existence of a fetal abnormality including potential risks and complications associated with her pregnancy, delivery and the later born child's condition and care, disclosed to Petitioner James by her physician in a timely fashion would have afforded her the opportunity to make an intelligent, informed choice between termination of her pregnancy and continuance full term until childbirth.

Petitioner James was denied this opportunity. She was neither informed of the sonogram results nor of any fetal abnormality until the choice of childbirth was her only viable option because the time for Petitioner James to have legally aborted her pregnancy had passed. Accordingly, Petitioner James has been required to endure extensive diagnostic testing, two onsets of premature labor and the pain of childbirth and the occurrence of continuing medical expenses for treatment and care of her child who suffers from quadrigeminal arachnoid cysts and hydrocephalus.

This case involves negligence claims brought by and on behalf of Louis Edmonds, a hydrocephalic child and by Taneika James, his mother for the medical expenses and damages associated with the child's permanent medical condition.

Preliminary Objections to Petitioners' Complaint in negligence were filed by all Respondents/Defendants on the basis that the Complaint failed to state a cause of action in light of 42 Pa. C.S.A. § 8305(a). Petitioners/Plaintiffs responded to the Preliminary Objections by challenging the constitutionality of 42 Pa. C.S.A. § 8305(a) in light of the protections afforded by the Fourteenth Amendment of the United States Constitution. Notice of this constitutional challenge of a Pennsylvania statute was properly given to the Commonwealth's Attorney General's office. The Preliminary Objections were sustained through a final Order of the Court of Common Pleas of Allegheny County by the Honorable James H. McLean, entered on November 30, 1990 (*see* Appendix D, pp. 7a-8a).

A Motion for Judgment on the Pleadings was filed by Respondent Cooper seeking dismissal of Petitioners/Plaintiffs' Complaint pursuant to 42 Pa.C.S.A. § 8305(a). Said Motion was granted on January 2, 1991 by the Honorable David S. Cercone (*see* Appendix D, p. 9a).

Petitioners filed a timely Notice of Appeal to the Superior Court of Pennsylvania and on March 13, 1991, the parties filed a Stipulation to Consolidate the Appeals. Again, Petitioners argued in their appeal that Pennsylvania's Wrongful Birth Statute (42 Pa.C.S.A. § 8305(a)) violated Petitioners' due process and equal protection rights afforded by the Fourteenth Amendment and contrary to the Supreme Court decision in *Roe v. Wade*, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973) and its progeny.

On or about April 30, 1992, the Superior Court of Pennsylvania affirmed the two Orders of the Court of Common Pleas of Allegheny County, the first by the Honorable David S. Cercone, entered January 2, 1991 by granting a Motion for Judgment on the Pleadings filed by Respondent/Defendant Wynne Cooper, M.D. and the second Order entered by the Honorable James H. McLean sustaining Respondent/Defendant's (the

Western Pennsylvania Hospital, Radiology Associates of Western Pennsylvania, P.C., Neal B. Simmons, M.D. and Harvey L. Neiman, M.D.) Preliminary Objections and dismissing Petitioners' Complaint (*see* Appendix C, p. 5a).

The Superior Court of Pennsylvania, in affirming the two Orders of the lower court, reasoned that the Wrongful Birth Statute did not amount to "state action" and was designed to meet a legitimate state interest.

On or about June 1, 1992, Petitioner filed a timely Petition for Allowance of Appeal with the Supreme Court of Pennsylvania. In this Petition, Petitioners raised the unconstitutionality of the Wrongful Birth Statute and the important federal question at issue. Said Petition was denied by the Supreme Court of Pennsylvania, per curiam, on January 6, 1993. Petitioners then filed an Application for Reargument with the Supreme Court of Pennsylvania which was also denied, *per curiam*, on February 12, 1993. Accordingly, Petitioners had exhausted all appeal rights with the court of last resort in the Commonwealth of Pennsylvania and therefore files this Petition for a Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

Introduction

Since the landmark decision of *Roe v. Wade*, 410 U.S. 113 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973), courts have acknowledged that public policy now supports, rather than mitigates against, the proposition that a woman must not be impermissibly denied a full opportunity to make a decision on whether to have an abortion or carry to term a child. *Berman v. Allen*, 80 N.J. 421, 432, 404 A.2d 8, 14 (1979).

Since *Roe*, the ability of medical scientists to predict or detect defects in the unborn has expanded significantly. Advances in the

field of prenatal screening and diagnosis have altered the applicable standard of care and for physicians now require appropriate testing and counseling for women at risk of bearing children with birth defects. *Harbeson v. Park-Davis, Inc.*, 746 F.2d 517 (9th Cir. 1984). Thus, courts have held that general principles of tort law require that physicians who negligently deprive a mother of the right to terminate her pregnancy in the face of a fetal defect must be held liable for the damages which are proximately caused therefrom.[1] Any other ruling would in effect immunize from liability those in the medical field providing inadequate guidance to persons who would choose to exercise their constitutional right to avoid the birth of a genetically deformed fetus. *Berman v. Allen, supra.* Under such actions, parents are awarded damages in an effort to compensate them for the cost of raising a handicapped child that, but for the negligence of a health-care provider, would have been aborted.

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1. To date, twenty-three jurisdictions recognize some cause of action for wrongful birth. *See Gallagher v. Duke University*, 852 F.2d 773 (4th Cir. N.C. 1988), *(reh'g denied)*; *Robak v. The United States*, 658 F.2d 471 (7th Cir. Ill. 1981) (applying Alabama law); *Phillips v. United States*, 575 F. Supp. 1309 (D.S.C. 1983); *Turpin v. Sortina*, 31 Cal. 3d 220, 182 Cal. Rptr. 337, 643 P.2d 943 (1982); *Lininger v. Eisenbaum*, 764 P.2d 1202 (Col. 1988); *Haymon v. Wilkerson*, 535 A.2d 880 (D.C. 1987); *Fassoulas v. Ramy*, 450 F.2d 822 (Fla. 1984); *Blake v. Cruz*, 108 Idaho 253, 698 P.2d 315 (1984); *Siemieniec v. Lutheran General Hospital*, 134 Ill. App. 3d 823 and 89 Ill. Dec. 484, and 480 N.E.2d 1227 (lst Dist. 1985); *Arche v. United States, Department of Army*, 247 Kan. 276 and 798 P.2d 477 (1990); *Pitre v. Opelousas General Hospital*, 530 S.2d 1151 (La. 1988); *Viccaro v. Melunasky*, 406 Mass. 77 and 551 N.E. 2d 8 (1990); *Proffit v. Bartolo*, 162 Mich. App. 35 and 412 N.W. 2d 232 (1937)*(app. denied)*; *Smith v. Cote*, 128 N.H. 231, 513 A.2d 341 (1986); *Hummel v. Riess*, 129 N.J. 118, 608 A.2d 1341 (1992); *Bani- Esraili v. Wald*, 127 Misc. 2d 202, 45 N.Y.S. 2d 708 (1985); *Speck v. Finegold*, 497 Pa. 77, 439 A.2d 110 (1981); *Jacobs v. Theimer*, 519 S.W. 2d 846, 1810 Supp. Ct. J. 222 (Tex. 1975); *Naccash v. Burger*, 223 Va. 406 , 290 S.E. 2d 825 (1982); *Harbinson v. Parke-Davis, Inc.*, 98 Wash. 2d 460, 656 P.2d 483 (1983); *James G. v. Caserta*, 332 S.E. 2d 872 (W. Va. 1985); *Dumer v. St. Michaels Hospital*, 69 Wisc. 2d 766, 233 N.W. 2d 372 (1975); *Beardsley v. Wierdsma*, 650 P.2d 288 (Wyo. 1982).

Although state legislatures enjoy a wide latitude in regulating tort actions, in doing so they may not impermissibly interfere with the rights implicitly or explicitly protected by the Constitution. *Munn v. Illinois,* 94 U.S. 113, 143 (1987); *Hickman v. Group Health Plan, Inc.,* 396 N.W. 2d 10 (Minn. 1986).

Pennsylvania has enacted a statute, 42 Pa. C.S.A. § 8305(a) which effectively denies a woman her constitutional right to make an informed decision to terminate her pregnancy by absolving physicians from any and all liability should they negligently fail to provide appropriate prenatal information to expectant mothers. For the reasons set forth below, Petitioners seek a Writ of Certiorari from this Court in order to establish the constitutionality of the Pennsylvania statute.

I.

THE CONSTITUTIONALITY OF LAWS PROHIBITING WRONGFUL BIRTH ACTIONS IS UNCLEAR AS THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH AND ELEVENTH CIRCUITS HAVE REACHED IMPLICITLY DIFFERENT HOLDINGS ON THE ISSUE.

In assessing the constitutionality of Pennsylvania's prohibition on wrongful birth causes of action, petitioners find themselves with apparently conflicting federal opinions. While the Court of Appeals for the Eleventh Circuit has upheld a cause of action for wrongful birth (*Robak v. United States of America,* 658 F.2d 471 (7th Cir. 1981)), the Court of Appeals for the Seventh Circuit has permitted such a claim to be barred by state law (*Campbell v. United States,* 962 F.2d 1579 (11th Cir. 1992)). Accordingly, pursuant to Rule 10(a) of the Rules of the Supreme Court of the United States, petitioners seek to have this court clarify the constitutionality of a prohibition of wrongful birth causes of action.

In *Robak v. United States of America*, 658 F.2d 471 (7th Cir. 1981), the Seventh Circuit Court of Appeals was faced with the issue of whether a pregnant mother had a valid cause of action against a hospital for the hospital's failure to diagnose the pregnant mother's rubella and further failure to inform her of the possible dangers to the fetus should the pregnancy proceed to term. The Court of Appeals held that an action for wrongful birth was permitted under Alabama law.

As the issue had not been addressed in Alabama, the Circuit Court looked to sister state laws as well as the constitutional rights protected by this Court's holding in *Roe v. Wade*, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d. 694 (1973). *Robak* at 474-475. In finding that wrongful birth actions were valid, the *Robak* court stated, "*Any other ruling* would in effect immunize from liability those in the medical field providing inadequate guidance to persons who choose to exercise their constitutional right to abort fetuses . . . ." *Id.* at 475, *citing Berman v. Allen*, 80 N.J. 421, 404 A.2d 8 (1971)[emphasis added].

When faced with a very similar cause of action, however, the Court of Appeals for the Eleventh Circuit refused to permit a cause of action for wrongful birth under Georgia law. *Campbell v. United States*, 962 F.2d 1579 (11th Cir. 1992). In *Campbell*, the court was presented with the question of whether the parents of a disabled child had a valid cause of action against a physician for failing to timely diagnose the fetus' severe abnormalities such that the mother could exercise her right terminate the pregnancy. The Georgia Supreme Court had previously ruled that no such cause of action was recognized in the state. Plaintiffs in *Campbell* challenged the constitutionality of that Georgia decision.

The Court of Appeals in *Campbell* found that the Georgia Supreme Court's refusal to recognize a cause of action for wrongful birth did not violate the United States Constitution. According to the court, Georgia's failure to protect plaintiffs from

a private physician's negligence did not amount to state action.[2]

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2. The *Campbell* court premises much of its "no state action" decision upon this Court's holding in *Flagg Bros., Inc., et al. v. Brooks et al.*, 436 U.S. 149, 98 S. Ct. 1729, 56 L. Ed. 2d 185 (1978).

However, the basis for finding no state action in *Flagg Bros.* is not applicable to petitioners' case.

In *Flagg Bros.*, the parties sought to declare unconstitutional a provision of New York's Uniform Commercial Code which permitted a private warehouseman to enforce a valid lien by selling goods entrusted to the warehousemen. The parties whose goods were to be sold alleged that New York's adoption of U.C.C. § 7-210 constituted state action that deprived them of their property in violation of the Equal Protection and Due Process Clauses of the Fourteenth Amendment. The court found *no state action* stating:

> There is no reason whatever to believe that either Flagg Brothers or respondents could not, if they wished, seek resort to the New York courts in order to either compel or prevent the 'surrendering of property' . . . . The lien in this case . . . provides for compensatory remedy and judicial relief against abuse . . . . The conduct of private actors in relying on . . . these liens to resort to self-help remedies does not permit conduct to be ascribed to the state.

Flagg Bros., 436 U.S. at 163.

In essence, this court found that the state's approval of self help remedies did not "delegate to Flagg Brothers an exclusive prerogative of the sovereign." *Id.*, 436 U.S. at 159. The statute itself provided for remedies against the warehouseman. *Id.*

In the instant case, the Pennsylvania legislature, through 42 Pa.C.S.A § 8305(a), has taken away *all* legal redress for women whose constitutional right to abortion has been infringed by the negligence of an physician. Said facts are quite different from *Flagg Bros.* and constitute sufficient state action to invoke the Fourteenth Amendment.

Accordingly, the requisite finding of state action, plaintiff's equal protection and due process challenges failed.

It is difficult to imagine that the Seventh Circuit Court of Appeals in *Robak* did not factor into its decision the same due process and equal protection considerations raised in *Campbell.* Despite the *Robak* court found that "any other holding" other than a *validation* of wrongful birth claims, would affect a party's constitutional right to choose under *Roe. Robak,* 658 F.2d at 475.

The *Robak* and *Campbell* decisions are hard to reconcile. One could argue that the cases in question are not inconsistent but simply factually distinct. In the *Robak* case, the court validated a wrongful birth claim in a state that had *not* taken any action on the issue. The *Campbell* court, on the other hand, was faced with a wrongful birth claim in a state whose highest court had prohibited such actions. Accordingly, it could be argued that each court reached a different result under different circumstances.

However, it is the very factual distinctions between the cases which highlight their *legal* inconsistency. How is it that in the *absence* of any state decision, the *Robak* court found a constitutionally implicated right to bring a wrongful birth cause of action, *but* in the face of an *existing state decision* prohibiting wrongful birth claims, the *Campbell* court found no state action and no constitutional right to bring a wrongful birth action?

As mentioned previously, twenty-three states recognize some form of action for wrongful birth.[3] Five of those states have based their decisions on *Roe v. Wade.*[4] In light of the growing disparity between jurisdictions, petitioners seek to have this court determine

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3. *See footnote 1.*

4. *Robak v. The United States,* 658 F.2d 471 (7th Cir. Ill. 1981) (applying Alabama law); *Haymon v. Wilkerson,* 535 A.2d 880 (D.C. 1987); *Blake v. Cruz,* (Cont'd)

the constitutionality of a state's prohibition of wrongful birth causes of action.

II.

PENNSYLVANIA'S PROHIBITION AGAINST WRONGFUL BIRTH ACTIONS SET FORTH IN 42 PA. C.S.A. § 8305(A) DEPRIVES A WOMAN OF HER CONSTITUTIONAL RIGHTS TO DUE PROCESS AND EQUAL PROTECTION UNDER THE UNITED STATES CONSTITUTION.

A. State Action.

In order to assert a violation of due process or equal protection under the United States Constitution, a party must prove requisite state action. *Shelly v. Kraemer,* 334 U.S. 1, 13, 68 S. Ct. 836, 842 (1948). Private conduct may be treated as state action for purposes of the Fourteenth Amendment if the conduct has received the imprimatur of the state. *Blum v. Yaretsky,* 457 U.S. 991, 1003, 102 S. Ct. 2777 (1982). Further, a state can be held responsible for a private decision when the state undertakes "significant encouragement," (even covertly), sufficient that the choices made in light of that encouragement must be deemed to be that of the state. *Blum,* 457 U.S. at 1004, 1005, 102 S. Ct. at 2876. Although the definition of state action is somewhat imprecise, a state in any of its manifestations may become so significantly involved in private discrimination that its actions constitute state action. *Hickman v. Group Health Plan, Inc.,* 396 N.W. 2d 10, 18 (dissenting opinion).

At issue in the instant case is the state's infringement on a woman's constitutional right to terminate a pregnancy under *Roe v.*

(Cont'd)

108 Idaho 253, 698 P.2d 315 (1984); *Smith v. Cote,* 128 N.H. 231, 513 A.2d 341 (1986); *Hummel v. Riess,* 129 N.J. 118, 608 A.2d 1341 (1992).

Wade, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973). In *Roe*, this Court held that a woman's *decision* as to whether to undergo an abortion is a privacy right, constitutionally protected under the Fourteenth Amendment. *Roe*, 410 U.S. at 153, 93 S. Ct. at 726 (emphasis added). Specifically, this right "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." *Id.* at 153, 93 S. Ct. at 726.

Under 42 Pa. C.S.A. § 8305(a), the legislature of the State of Pennsylvania has directly acted to immunize health care providers from liability should they negligently interfere with a woman's decision making process under *Roe*. In pertinent part, 42 Pa. C.S.A. § 8305(a) reads:

> (a) Wrongful birth—there shall be no cause of action or award of damages on behalf of any person based on a claim that, but for an act or omission of the defendant, a person once conceived would not or should not have been born . . . .

(*See* Appendix D, p. 8a).

Liability acts as a deterrent to malpractice, *Blake v. Cruz*, 108 Idaho 253, 698 P.2d 315 (1984), and encourages the side objectives of proper prenatal testing, genetic counseling, and informed decision making. Under 42 Pa. C.S.A. § 8305(a), a defendant health care provider may, with the express approval of the state and without fear of recourse, negligently deprive a woman of the information necessary to exercise her constitutional right to make an informed decision as to whether to terminate her pregnancy. Pennsylvania has chosen to offer immunity to such conduct via statute. It is plaintiffs' contention that state sanctioned removal of liability for wrongful birth claims is a direct infringement on a woman's right to make an informed choice concerning her pregnancy.

While it appears on the surface that it is the health care provider's conduct, and not the state's, which deprives a woman of her right to choose, this deprivation carries with it the approval and support of the state via statute. It is axiomatic that the very essence of the relationship between a physician and a pregnant woman revolves around that woman's desire to effectively and responsibly obtain information in order to make personal decisions concerning her pregnancy. By removing liability of health care providers, the legislature of the state of Pennsylvania has removed the only safeguard that women can rely upon in protecting the medical information that is essential to their right to make an informed decision.

In the instant case, the state of Pennsylvania has stepped into the private physician-patient relationship, and directly altered the legal landscape under which a woman exercises her constitutional right to choose as set forth in *Roe, supra.*

At least one court has found that a state's failure *to enact* legislation recognizing wrongful birth actions does not violate the constitutional protections of the Fourteenth Amendment. *Campbell v. United States, supra.* However, in the instant case, the Pennsylvania legislature has affirmatively acted to absolve physicians from liability should they interfere with the decision making process of women contemplating abortion.

The constitutionality of 42 Pa. C.S.A. § 8305(a) has not yet been reviewed by the Supreme Court of Pennsylvania (that state's highest court), nor by any federal courts in the jurisdiction. Although lower court decisions in the state have ruled that 42 Pa. C.S.A. § 8305(a) does not *directly* interfere with a woman's right to choose, *Dansby v. Thomas Jefferson University Hospital,* No. 92-706, __ A.2d __, 1993 Pa. Super. Lexis 950 (1993),[5] it is

5. This opinion was handed down on March 19, 1993 and has not yet been released for publication in the slip opinions or permanent law reports.

petitioner's position that the actual *impact* and *effect* of the statute encourages such conduct.

In *Hickman v. Group Health Plan. Inc.*, 396 N.W. 2d 10 (1986), the Supreme Court of Minnesota grappled with this very issue. A divided court (four to three) ultimately found no cause of action for wrongful birth. Writing for three minority justices, Chief Justice Amdahl wrote a spirited dissent. In that dissent, Chief Justice Amdahl wrote:

> The possibility that a doctor will be held responsible for negligent conduct stands as a safeguard that the woman will be fully informed. The legislature's removal of the negligence action safeguard, while not preventing a woman from actually obtaining an abortion, *does* harm the complete exercise of a woman's rights under *Roe*. I see this as a direct infringement on the informed decision making process as enunciated in *Roe*.

Hickman, at 19 (emphasis added).

Thus, the state has placed its imprimatur on conduct which will directly interfere with a woman's rights under *Roe, supra*. Such government approval is sufficiently significant under the facts of this case to be deemed "state action."

B. Due Process.

The due process clause of the Fourteenth Amendment guarantees the right of freedom of choice in matters of personal family life, child bearing and rearing, and termination of pregnancy. Under *Roe v. Wade, supra* and its progeny, a woman has a constitutionally protected right to decide, free from

governmental intrusion, whether to terminate her pregnancy. Courts have consistently struck down statutes which impose or restrict this procreative freedom of a woman. *Bellotti v. Baird*, 443 U.S. 622 (1979); *Planned Parenthood v. Danforth*, 428 U.S. 52 (1986); *Sendak v. Arnold*, 429 U.S. 1968 (1978). However, a due process challenge to 42 Pa. C.S.A. § 8305(a) has never been heard by the Supreme Court of Pennsylvania or by any federal court in the jurisdiction.

It is plaintiffs' contention that Pennsylvania's prohibition against wrongful birth actions under 42 Pa. C.S.A. § 8305(a) infringes upon a woman's fundamental right to choose as espoused in *Roe* and it progeny.

In *Planned Parenthood of Southeastern Pennsylvania, et al. v. Robert P. Casey, et al.*, __ U.S.__, 112 S. Ct. 2791, 120 L. Ed. 2d 674, 60 L.W. 4795 (June 29, 1992), this Court reasoned that the state's regulation of abortion was limited such that an undue burden may not be placed on a woman's decision to terminate. That same test must be applied in the instant case.

Pennsylvania's wrongful birth statute (42 Pa. C.S.A. § 8305(a)) goes far beyond placing an undue burden on a woman's ability to make the decision whether to terminate a pregnancy. The statute effectively validates the nondisclosure of vital information needed in order for a woman to exercise her constitutional rights under *Roe*. In the instant case, the negligent acts and procedures undertaken by the defendants put petitioners in the position of being unable to make an informed decision as to whether to carry to term a handicapped child. *Robak v. United States*, 658 F.2d 471 (7th Cir. 1981). Pennsylvania's statute precludes petitioner from seeking *any* remedy for this deprivation of rights.[6]

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6. In *Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59, 98 S. Ct. 260, 57 L. Ed. 2d 595 (1978), this Court left open the question of whether a legislatively enacted prohibition on common law remedies must offer (Cont'd)

Under the Fourteenth Amendment to the United States Constitution, state action which infringes upon a fundamental interest (such as the right of procreation) is subject to a strict scrutiny standard of review. *United States v. Carolene Products Co.*, 304 U.S. 254 (1938). The issue of abortion touches upon fundamental interests of privacy and liberty. *Roe, supra; Harris v. McRae*, 448 U.S. 297, 100 S. Ct. 2671, 65 L. Ed. 2d 784 (1980). Accordingly, there can be little argument that the Pennsylvania statute in question is subject to strict scrutiny review.

Under that standard of review, the state bears the burden of showing that it has a compelling governmental interest and the actions taken in furtherance of that interest are narrowly tailored. *Zablocki v. Redhail*, 434 U.S. 374 (1978).

In the context of a woman's right to choose to terminate her pregnancy, this Court has found only two interests sufficiently compelling to justify interference with a woman's right to choose: (1) protecting the health of the mother; and (2) protecting the potential life of the fetus. *Roe*, 410 U.S. at 155. Pennsylvania's prohibition on wrongful birth actions does not fall into either of these two categories.

42 Pa. C.S.A. § 8305(a) cannot be justified by concerns for maternal health because it lowers the enforceable standard of care exercised by physicians. It therefore diminishes the medical information available to a woman and increases the risks to her health. *Hickman*, 396 N.W.2d at 20.

(Cont'd)

a *quid pro quo* substitute in order to satisfy the Due Process Clause of the Fourteenth Amendment. *Duke Power Co.* 438 U.S. at 87-88, 98 S. Ct. at 2637-2638, 57 L. Ed. 2d __. While *limiting liability* for certain conduct was found to be fairly common, *abolishing* certain liability and leaving no comparable remedy in its place was questioned but never addressed. *Id.* This case presents this very issue.

The statute in question also does not protect the potential unborn fetus, as the compelling interests of the state do not come into existence until the fetus is viable. *Roe*, 410 U.S. at 160. In the instant case, it is plaintiffs' contention that the negligence occurred prior to viability. Accordingly, there was no compelling governmental interest to protect.

In sum, there is no compelling governmental interest in 42 Pa. C.S.A. § 8305(a). As the statute directly acts to infringe the woman's right to choose under *Roe*, the statute cannot withstand constitutional scrutiny and must be declared unconstitutional and in violation of the Due Process Clause of the Fourteenth Amendment.

C. Equal Protection.

Pennsylvania's prohibition on wrongful birth actions singles out a group of parents making a procreative decision when that decision involves abortion. The statute does not, however, bar an action for negligence where a physician has interfered with a couple's *right to conceive. Hatter v. Landsberg*, 563 A.2d 146, 386 Pa. Super. 438 (1989), *appeal denied*, 578 A.2d 414. In fact, the courts in Pennsylvania have found that the legislative history of 42 Pa. C.S.A. § 8305(a) was primarily concerned with eliminating suits brought by parents seeking to recover damages for failure to abort a child or negligently aborting a child, while permitting claims for negligent sterilization. *Id.* (*See* Appendix D, p. 19a).It is plaintiff's contention that such a classification subordinates the privacy rights of a women in favor of non-compelling state interests. Such subordination is unconstitutional. *Thornberg v. American College of Obstetricians*, 476 U.S. 477, 106 S. Ct. 2169, 90 L. Ed. 2d 779 (1986).

By creating a classification of persons who are precluded from bringing tort actions, 42 Pa.C.S.A. § 8305(a) eliminates a legal remedy for women who would have chosen to exercise their

fundamental right to choose. In order for a state statute to justify burdening a fundamental interest under the equal protection clause of the Fourteenth Amendment (in this case the right to choose an abortion), the statute must withstand strict scrutiny and accordingly must be based upon a compelling state interest. *Skinner v. Oklahoma*, 316 U.S. 353 (1942). Pennsylvania's wrongful birth statute fails to withstand strict scrutiny.

As set forth by Judge David Cercone in the lower court opinion in this case (*see* Appendix E, pp. 25a-26a), the recognized state interests in prohibiting wrongful *birth* causes of action are: (1) encouraging childbirth over abortion in an effort to avoid placing a value on handicapped children, (2) avoiding having the legislature dictate to the medical community how to practice obstetrics, and 3) reducing the number of medical malpractice actions in an effort to bring down insurance costs. *Id.*

First, *encouraging childbirth over abortion and reducing medical costs* cannot constitute a compelling governmental interest in violating petitioners' equal protection rights under the United States Constitution. If Pennsylvania's wrongful birth statute encourages childbirth, it does so only by sanctioning negligent medical treatment. The statute specifically permits physicians to negligently withhold information essential to a parent's procreative decision making process as set forth in *Roe, supra.* That decision making process has been consistently reaffirmed by this Court. *Roe v. Wade, supra; Webster v. Reproductive Health Services*, 492 U.S. 490, 109 S. Ct. 3040, 106 L. Ed. 2d 410 (1989); *Planned Parenthood Association v. Ashcroft*, 462 U.S. 476, 103 S. Ct. 2517, at 76 L. Ed. 2d 733 (1983). In reality, the statute does not encourage decision making in favor of childbirth, but instead prevents informed decision-making altogether.

Further, the legislature in Pennsylvania clearly has not chosen

the least restrictive means of furthering their espoused interests. Banning any and all recovery for negligent pre-natal testing and counseling is a draconian means of bringing down health care costs and promoting the value of human life. The statute single-handedly eliminates *all* recovery for negligence that interferes with a women's constitutional rights. Such a statute strikes at the very core of the equal protection clause of the Fourteenth Amendment.

Finally, the state interest of *seeking to avoid dictating to the medical profession how to practice obstetrics* flies in the face of the most fundamental common law tort principles. As set forth in *Robak v. United States,* 658 F.2d at 476. a wrongful life cause of action is little different from an ordinary malpractice action. "It involves a failure by a physician to meet a required standard of care, which resulted in specific damages to the plaintiff." *Robak* at 476 *citing Becker v Schwartz,* 46 N.Y. 2d 401, 386 N.E. 2d 807 (1978).

The Supreme Court of Pennsylvania specifically recognized an injured parties right to recover for such negligence in *Speck v. Finegold,* 497 Pa. 77, 439 A.2d 110 (1981). The court found that permitting a wrongful birth action would: (1) neither inhibit nor promote abortions in the Commonwealth; (2) preserve a women's constitutional right to choose under *Roe v. Wade, supra* and (3) best served public policy by permitting discovery for this type of injury. *Speck,* 439 A.2d at 114, 115.

The legislature's alleged interests in now banning wrongful birth causes of action does not withstand constitutional scrutiny. The espoused state interest is neither compelling nor narrowly tailored to remedy the interests set forth. By closing the court doors to only those persons who would have chosen to exercise their rights under *Roe,* 42 Pa.C.S.A. § 8305(a) violates the equal protection clause of the Fourteenth Amendment.

CONCLUSION

It is clear from a review of the opinions of the Superior Court of Pennsylvania and the legislative intent behind the enactment of 42 Pa. C.S.A. § 8305(a), a continuing erosion of the rights and protections afforded by the Fourteenth Amendment and *Roe v. Wade, supra* is taking place. In light of the protections set forth in *Planned Parenthood of Southeastern Pennsylvania v. Robert P. Casey et al., supra,* Pennsylvania's Wrongful Birth Statute is an unreasonable and unjustifiable restriction on the flow of information to pregnant women.

Furthermore, the issue of the viability of a wrongful birth cause of action is producing conflicting decisions and opinions, not only in the lower courts of different jurisdictions, but also in separate circuits of the United States Circuit Court of Appeals. Petitioners pray that Your Honorable Court grant their Petition for a Writ of Certiorari and review the contradictions of the lower courts regarding the constitutionality of Pennsylvania's Wrongful Birth Statute.

Respectfully submitted,

BRUCE S. GELMAN
Attorney for Petitioners
1701 Law & Finance Building
Pittsburgh, PA 15219
(412) 288-9200

APPENDIX A — PER CURIAM ORDER OF THE SUPREME COURT OF PENNSYLVANIA DENYING APPLICATION FOR REARGUMENT DATED FEBRUARY 12, 1993

SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

Charles W. Johns, Esquire
Prothonotary

Irma T. Gardner
Deputy Prothonotary

801 City-County Building
Pittsburgh, Pa.
15219-2463
(412) 565-2816

February 12, 1993

Bruce S. Gelman, Esquire
Janet S. Livengood, Esquire
1701 Law & Finance Building
Pittsburgh, PA 15219

In Re: Louis Edmonds, a minor by Taneika James, et al. v. The Western Pa. Hospital, etc., et al.
Louis Edmonds, a minor by Taneika James, et al. v. Wynne Cooper, M.D.
No. 0280 W.D. Allocatur Docket 1992

Dear Mr. Gelman and Ms. Livengood:

The Court has entered the following Order on your Application for Reargument in the above-captioned matter:

"February 12, 1993
Petition Denied
Per Curiam"

Very truly yours,
s/ Irma T. Gardner
Irma T. Gardner
Deputy Prothonotary

ITG/dal
cc: Richard J. Federowicz, Esq.
Elaine S. Nace, Esq.
Giles J. Gaca, Esq.
Honorable James H. McLean
Honorable David S. Cercone

APPENDIX B — PER CURIAM ORDER OF THE SUPREME COURT OF PENNSYLVANIA DENYING PETITION FOR ALLOWANCE OF APPEAL DATED JANUARY 7, 1993

SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

Charles W. Johns, Esquire
Prothonotary

Irma T. Gardner
Deputy Prothonotary

801 City-County Building
Pittsburgh, Pa.
15219-2463
(412) 565-2816

January 7, 1993

Bruce S. Gelman, Esquire
Janet S. Livengood, Esquire
1701 Law & Finance Building
Pittsburgh, PA 15219

In Re: Louis Edmonds, a minor by Taneika James, et al. v. The Western Pa. Hospital, etc., et al.
Louis Edmonds, a minor by Taneika James, et al. v. Wynne Cooper, M.D.
No. 0280 W.D. Allocatur Docket 1992

Dear Mr. Gelman and Ms. Livengood:

The Court has entered the following Order on your Petition for Allowance of Appeal in the above-captioned matter:

"January 6, 1993
Petition Denied
Per Curiam"

Appendix B

Very truly yours,
s/ Irma T. Gardner
Irma T. Gardner
Deputy Prothonotary

ITG/dal
cc: Richard J. Federowicz, Esq.
Elaine S. Nace, Esq.
Giles J. Gaca, Esq.
Honorable James H. McLean
Honorable David S. Cercone

APPENDIX C — JUDGMENT OF THE SUPERIOR COURT OF PENNSYLVANIA DATED APRIL 30, 1992

SUPERIOR COURT OF PENNSYLVANIA
PITTSBURGH DISTRICT

No. 83 Pittsburgh 1991

Louis Edmonds, A Minor by Taneika James, Mother etc.

Appellants

v

The Western Pennsylvania etc.

No. 146 Pittsburgh 1991

Louis Edmonds, A Minor by Taneika James etc.

v

Wynne Cooper, M.D.

JUDGMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the Court of Common Pleas of Allegheny County be, and the same is hereby ORDERS AFFIRMED.

BY THE COURT:

s/ Eleanor R. Valecho
DEPUTY PROTHONOTARY

DATED: April 30, 1992

APPENDIX D — OPINIONS OF THE SUPERIOR COURT OF PENNSYLVANIA DATED APRIL 30, 1992

No. 00083 Pittsburgh, 1991

IN THE SUPERIOR COURT OF PENNSYLVANIA

LOUIS EDMONDS, a Minor by TANEIKA JAMES, Mother and Natural Guardian, and TANEIKA JAMES, in her own right,

Appellants

v.

THE WESTERN PENNSYLVANIA HOSPITAL RADIOLOGY ASSOCIATES of WESTERN PENNSYLVANIA P.C., NEAL B. SIMMONS, M.D., and HARVEY L. NEIMAN, M.D.

Appeal from the Order Dated November 30, 1990, Docketed December 3, 1990, in the Court of Common Pleas of Allegheny County, Civil Division, at No. 90-16421.

IN THE SUPERIOR COURT OF PENNSYLVANIA

No. 00146 Pittsburgh, 1991

LOUIS EDMONDS, a Minor by TANEIKA JAMES, Mother and Natural Guardian, and TANEIKA JAMES, in her own right,

Appellants

v.

WYNNE COOPER, M.D.

Appeal from the Order Entered January 2, 1992, in the Court of Common Pleas of Allegheny County, Civil Division, at No. GD89-18962.

Appendix D

BEFORE: CAVANAUGH, WIENAND, and HESTER, JJ.

OPINION BY HESTER, J.: FILED: April 30, 1992

This is a consolidated appeal from orders entered in the Court of Common Pleas of Allegheny County on November 30, 1990, and January 2, 1991. Those orders, which respectively sustained certain preliminary objections in the nature of a demurrer and granted Wynne Cooper, M.D., judgment on the pleadings, disposed of actions arising from circumstances related to the pregnancy of Taneika James and the birth of her physically impaired son, Louis Edmonds. For the reasons set forth below, we affirm.

The procedural history of the first appeal, number 00083 Pittsburgh, 1991, may be summarized as follows. On September 25, 1990, Ms. James, on behalf of herself and her son, filed a complaint against the Western Pennsylvania Hospital, Radiology Associates of Western Pennsylvania, P.C., Neal B. Simmons, M.D., and Harvey L. Neiman, M.D. In that complaint, Ms. James asserted that a sonogram taken during her pregnancy revealed a fetal abnormality, alleged that she was not informed of that condition in a timely fashion, and implied that she would have sought an abortion had she been so informed. Consequently, Ms. James requested damages arising from both the pregnancy and the birth of her son. In addition, she sought damages on behalf of her son for the pain and complications associated with his impairment as well as the treatment it rendered necessary.

Shortly after initiating the action, appellants amended their complaint to clarify the relationship between the individual and institutional medical providers. Thereafter, appellees, relying upon the statutory prohibition against causes of action premised

upon a claim that a person should not have been born, *see* 42 Pa.C.S. § 8305, filed preliminary objections in the nature of a demurrer.[1] On November 30, 1990, the trial court entered the challenged order sustaining those objections. Appellants subsequently filed a timely notice of appeal.

---

1. 42 Pa.C.S. § 8305 (footnotes omitted) states:

> § 8305. Actions for wrongful birth and wrongful life
>
> (a) Wrongful birth. —There shall be no cause of action or award of damages on behalf of any person based on a claim that, for an act or omission of the defendant, a person once conceived would not or should not have been born. Nothing contained in this subsection shall be construed to prohibit any cause of action or award of damages for the wrongful death of a woman, or on account of physical injury suffered by a woman or a child, as a result of an attempted abortion. Nothing contained in this subsection shall be construed to provide a defense against any proceeding charging a health care practitioner with intentional misrepresentation under the act of October 5, 1978 (P.L. 1109, No. 261), known as the Osteopathic Medical Practice Act, the act of December 20, 1985 (P.L. 457, No. 112), known as the Medical Practice Act of 1985, or any other act regulating the professional practices of health care practitioners.
>
> (b) Wrongful life. —There shall be no cause of action on behalf of any person based on a claim that, but for an act or omission of the defendant, the person would not have been conceived or, once conceived, would or should have been aborted.
>
> (c) Conception. —A person shall be deemed to be conceived at the moment of fertilization.

Appendix D

We now turn to appeal number 00146 Pittsburgh, 1991. On January 3, 1989, appellants initiated proceedings against Wynne Cooper, M.D., by filing a praecipe for writ of summons. Subsequently, following the reissuance of the writ and the effectuation of service, they filed a complaint which contained allegations substantially similar to those previously described. The parties then filed additional pleadings and proceeded with discover. On September 11, 1990, after appellants requested a jury trial, Dr. Cooper moved for judgment on the pleadings contending that the causes of action asserted by appellants were barred by 42 Pa.C.S. § 8305. Four months later, the trial court entered the order granting the requested relief. Appellants filed a timely notice of appeal, and we consolidated the action with appeal number 00083 Pittsburgh, 1991, for argument and disposition.

It has long been clear that we have an obligation to consider the appropriateness of each appeal and that such consideration may be undertaken sua sponte. *Gatten v. Merzi*, 397 Pa. Super. 148, 579 A.2d 974 (1990) (*per curiam*). Moreover, we note that absent a specific statutory provision to the contrary, any appeal determined to be interlocutory must be quashed. *Id.* With these principles in mind, we sua sponte address the propriety of the present appeals.

Our review of the record relating to appeal number 00146 Pittsburgh, 1991, clearly establishes that it was taken from a final order and that it is properly before us for disposition. *See Indiana County Hospital Authority v. McCarl's Plumbing & Heating Co.*, 344 Pa.Super. 276, 496 A.2d 767 (1985) (*per curiam*) (order granting judgment on the pleadings is a final order and therefore, appealable). With respect to the remaining appeal, we note that the order sustaining the preliminary objections of the various medical providers did not dismiss appellants' complaint or explicitly dispose of the action; however, it effectively terminated the

proceedings. Therefore, we find that order also to be final and appealable. *See Hudock v. Donegal Mutual Insurance Co.*, 438 Pa. 272, 264 A.2d 668 (1970) (order which sustains preliminary objections in the nature of a demurrer without explicitly terminating the action is final and appealable if it effectively terminates action). Accordingly, we turn to the merits of the two appeals.

The standards utilized in reviewing the propriety of decisions either sustaining preliminary objections in the nature of a demurrer or entering judgment on the pleadings are well-established. With respect to the former decisions, we note:

> It is axiomatic in the law of pleading that preliminary objections in the nature of a demurrer admit as true all well and clearly pleaded material, factual averments and all inferences fairly deducible therefrom. *Yania v. Bigan*, 397 Pa. 316, 155 A.2d 343 (1959); *Byers v. Ward*, 368 Pa. 416, 84 A.2d 307 (1951). Conclusions of law and unjustified inferences are not admitted by the pleading. *Lerman v. Rudolf*, 413 A.2d 555, 198 A.2d 532 (1964). Starting from this point of reference the complaint must be examined to determine whether it sets forth a cause of action which, if proved, would entitle the party to the relief sought. If such is the case, the demurrer may not be sustained. On the other hand, where the complaint fails to set forth a cause of action, a preliminary objection in the nature of a demurrer is properly sustained.

Appendix D

Greenspan v. United Services Automobile Assn., 324 Pa.Super. 315, 318, 471 A.2d 856, 857-58 (1984), quoting *Rose v. Wissinger*, 294 Pa.Super. 265, 439 A.2d 1193 (1982). In connection with the latter decisions, we have indicated:

> Entry of judgment on the pleadings is permitted under Pa.R.C.P. 1034 which provides for such judgment after the pleadings are closed, but within such time as not to delay trial. A motion for judgment on the pleadings is similar to a demurrer. *Karns v. Tony Vitale Fireworks Corporation*, 436 Pa. 181, 259 A.2d 687 (1969). It may be entered where there are no disputed issues of fact and the moving party is entitled to judgment as a matter of law. *Gallo v. J.C. Penney Casualty Insurance Co.*, 328 Pa.Super. 267, 476 A.2d 1322 (1984); *Vogel v. Berkley*, 354 Pa.Super. 291, 511 A.2d 878 (1986); *Groff v. Pete Kingsley Building, Inc.*, 374 Pa.Super. 377, 543 A.2d 128 (1988). In determining if there is a dispute as to facts, the court must confine its consideration to the pleadings and relevant documents. *DiAndrea v. Reliance Savings & Loan Association*, 310 Pa.Super. 537, 456 A.2d 1066 (1983). The scope of review on appeal from the grant of judgment on the pleadings is plenary. We must determine if the action of the court below was based on a clear error of law or whether there were facts disclosed by the pleadings which should properly go to the jury. *Keystone Automated Equipment Co. v. Reliance Insurance Co.*, 369 Pa.Super. 472, 535 A.2d 648 (1988).

Koser v. Harleysville Mutual Insurance Co., __ Pa. Super. __, __, 595 A.2d 128, 129-30 (1991). In the present cases, the various motions of appellees were premised upon the contention that appellants' claims supported no causes of action in light of 42 Pa.C.S. § 8305. Appellants' challenge to the trial courts' decisions on those motions concerns only the personal claims of Ms. James. In addition, we note that none of the parties questions the fact that 42 Pa.C.S. § 8305 extinguished a previously recognized cause of action for wrongful birth or contend that its provisions are inapplicable to Ms. James's claims. Accordingly, resolution of the question of the propriety of the two contested orders hinges upon a determination as to the constitutionality of 42 Pa.C.S. § 8305.

Appellants assert that 42 Pa.C.S. § 8305, by extinguishing causes of action for wrongful birth, interferes with a woman's abortion right by allowing a physician to both intentionally misrepresent and negligently fail to impart information impacting upon such a decision. Accordingly, they contend that 42 Pa.C.S. § 8305 impinges upon abortion rights and violates both the due process and equal protection clauses of the fourteenth amendment of the United States Constitution.[2] This issue, which is one of first impression,[3] is devoid of merit.[4]

---

2. Our review of the record reveals that appellant, in substantial conformity with the dictates of Pa.R.C.P. 235 and Pa.R.A.P. 521, provided the Attorney General's Office with notice of its constitutional challenge at both this level and the trial level. To date, the Attorney General has not expressed a willingness to intervene in the proceedings.

3. We note that amici curiae challenged the constitutionality of both the substantive provisions of 42 Pa.C.S. § 8305 and its retroactive application in *Butler v. Rolling Hill Hospital*, 382 Pa.Super. 330, 555 A.2d 205 (1989). However, as we determined that they failed to provide the Attorney General's Office with the appropriate notification, we declined to address those issues.

(Cont'd)

Appendix D

Preliminarily, we note that legislative encactments [sic], such as the challenged statutory provision, enjoying a strong presumption of constitutionality. *Dranzo v. Winterhalter,* 395 Pa. Super. 578, 577 A.2d 1349 (1990). Consequently, all doubts relating to the constitutionality of such an enactment must be resolved in its favor. *Id.* Thus, it is clear that a party raising a constitutional challenge has a heavy burden of rebutting the presumption of constitutionality and demonstrating that the statute clearly, plainly, and palpably violates constitutional precepts. *Id.* Utilizing these principles, we must examine the contested provision and determine whether either the due process or equal protection clauses of the fourteenth amendment render it unconstitutional.

(Cont'd)

Two years after *Butler* was decided, we considered similar challenges in *Jenkins v. Hospital of the Medical College of Pennsylvania,* 401 Pa.Super. 604, 585 A.2d 1091 (1991) (*en banc*). In that case, we concluded that retroactive application of 42 Pa.C.S. § 8305 (a) to bar a cause of action tht accrued four years prior to its enactment was unconstitutional. Accordingly, we reversed an order striking certain provisions of a complaint. In light of this disposition, we did not address any of the substantive challenges.

4. Appellees Harvey L. Neiman, M.D., and Radiology Associates of Western Pennsylvania, P.C., assert that appellants' constitutional challenge is moot. In support of this assertion, they point out that appellants admitted in the complaint that Louis's average gestational age was over twenty-five weeks at the time that the alleged failure to notify occurred, *see* Reproduced Record ("R.R.") at 78a, and that physicians are prohibited by 18 Pa.C.S. § 3211 (a) from performing abortions on fetuses with a gestational age over twenty-four weeks. However, we not that 18 Pa.C.S. § 3211 (a) is a criminal provision that became effective in January, 1990, over two years after the relevant events occurred. *See* R.R. at 77a. Furthermore, the provision's retroactive application would render it an ex post facto law in violation of article 1 section 10 of the United States Constitution. Accordingly, as we find that 18 Pa.C.S. § 3211 (a) could not have affected Ms. James's ability to obtain an abortion at the relevant time, it is clear that the mootness claim is devoid of merit.

Appendix D

In pertinent part, 42 Pa.C.S. § 8305 (footnotes omitted) states:

> (a) Wrongful birth. —There shall be no cause of action or award of damages on behalf of any person based on a claim that, but for an act or omission of the defendant, a person once conceived would not or should not have been born. Nothing contained in this subsection shall be construed to prohibit any cause of action or award of damages for the wrongful death of a woman, or on account of physical injury suffered by a woman or child, as a result of an attempted abortion. Nothing contained in this subsection shall be construed to provide a defense against any proceeding charging a health care practitioner with intentional misrepresentation under the act of October 5, 1978 (P.L. 1109, No. 261), known as the Osteopathic Medical Practice Act, the act of December 20, 1985 (P.L. 457, No. 112), known as the Medical Practice Act of 1985, or any other act regulating the professional practices of health care practitioners.

It long has been clear that in order to establish a fourteenth amendment violation, a litigant must demonstrate state action or involvement in connection with the matter at issue. *See Shelley v. Kraemer,* 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161 (1948). Furthermore, a state normally may be held responsible for private conduct only when it has "exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the [s]tate." *Blum v. Yaretsky,* 457 U.S. 991, 1004, 102 S.Ct. 2777, 2786, 73

L.Ed.2d 534, 546 (1982). As mentioned previously, appellants assert that the statutory provision at issue impinges upon a woman's right to obtain an abortion, a right that with some qualifications was recognized by the United States Supreme Court in *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973). However, our review of the clear language contained within that provision reveals that it neither regulates nor directly affects such rights. Instead, that language merely extinguishes all causes of action arising from a claim that but for the improper conduct of a medical provider, a child would have been aborted prior to birth. Thus, resolution of the state action issue rests upon the determination of whether 42 Pa.C.S. § 8305 (a) encourages medical providers to infringe upon the abortion rights of their patients.

The Osteopathic Medical Practice Act, 63 P.S. § 271.1 *et seq.*, and the Medical Practice Act of 1985, 63 P.S. § 422.1 *et seq.*, respectively create the State Board of Osteopathic Medicine and the State Board of Medicine. In addition, they establish licensing procedures for various medical professionals, including physicians, and provide that licenses may be refused, revoked, or suspended for certain enumerated reasons. According to the two acts, physicians may be disciplined by the appropriate boards for making intentional misrepresentations in connection with patient care. *See* 63 P.S. §§ 271.15 (a) (2) and 422.41 (2). Thus, if a physician intentionally misrepresented to a woman the state of her health or that of her fetus in an effort to infringe upon her abortion rights, he could be disciplined by the appropriate licensing authority. Since 42 Pa.C.S. § 8305 (a) specifically indicates that it provides no defense to a disciplinary proceeding involving such misrepresentations, it clearly does not encourage physicians to make them. Consequently, we turn to the question of whether the challenged provision encourages negligent behavior on the part of

physicians with respect to the impartation of information affecting abortion decisions.

Although the provisions of 42 Pa.C.S. § 8305 (a) clearly relieve physicians from liability for negligently failing to provide women with information affecting abortion decisions, we would be engaging in speculation were we to assume that this extinguishment of liability encourages such improper behavior. Thus, it is clear that the issue of the challenged provisions's effect is open to question. Since all doubts relating to the constitutionality of a statutory provision must be resolved in its favor, *see Dranzo v. Winterhalter, supra,* we must presume that 42 Pa.C.S. § 8305 (a) does not encourage physicians to engage in the negligent conduct at issue.

As demonstrated above, 42 Pa.C.S. § 8305 (a) does not encourage either intentional misrepresentations or the negligent impartation of information relating to abortion rights. Consequently, that provision does not amount to state action affecting such rights, and appellants' fourteenth amendment claims must fail.[5] Since 42 Pa.C.S. § 8305 is constitutional, the trial courts properly could have relied upon it to dismiss Ms. James's claims as not supporting a cause of action.[6]

---

5. We note that our decision in this regard is consistent with one reached by the Supreme Court of Minnesota in connection with a statutory provision which indicated that no person may pursue a cause of action premised upon a claim that a child would have been aborted absent the acts or omissions of another. In *Hickman v. Group Health Plan,* 396 N.W.2d 10 (Minn. 1986), tht court, citing *Shelley v. Kraemer, supra,* determined that the provision in question did not directly affect the right of a woman to obtain an abortion. Consequently, it concluded that the plaintiffs had established no state action relating to that matter.

6. We uphold the statutory bar relating to the maintenance of causes of action

(Cont'd)

Appendix D

Orders affirmed.

WIEAND, J. FILES A CONCURRING OPINION

(Cont'd)
premised upon assertions that but for the improper acts of another a child would not have been born. However, our decisions does not impact upon the right of a mother to recover under ordinary malpractice principles for treatment rendered her by a medical provider during the period of gestation. Appellants clearly indicated in their complaints that these actions were premised upon the former theory and they do not challenge the applicability of the provisions contained in 42 PaC.S. § 8305.

Appendix D

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 83 Pittsburgh, 1991

LOUIS EDMONDS, a minor by TANEIKA JAMES, mother and natural guardian, and TANEIKA JAMES, in her own right,

Appellants

vs.

THE WESTERN PENNSYLVANIA HOSPITAL, RADIOLOGY ASSOCIATES OF WESTERN PENNSYLVANIA P.C., NEAL B. SIMONS, M.D. and HARVEY L. NEIMAN, M.D.,

Appellees

Appeal from Order of the Court of Common Pleas, Civil Division, of Allegheny County, No. 90-16421.

No. 146 Pittsburgh, 1991

LOUIS EDMONDS, a minor by TANEIKA JAMES, mother and natural guardian, and TANEIKA JAMES, in her own right,

Appellants

vs.

WYNNE COOPER, M.D.,

Appellee

Appeal from Order of the Court of Common Pleas, Civil Division, of Allegheny County, No. GD89-18962.

Appendix D

BEFORE: CAVANAUGH, WIEAND AND HETER, JJ.

CONCURRING OPINION BY WIEAND, J.:

FILED April 30, 1992

I concur in the result. In my judgment, 42 Pa. C.S. § 8305 is rationally designed to meet a legitimate state interest and, therefore, is constitutional. In this respect, I would adopt the reasoning of the Honorable David S. Cercone who, in entering judgment on the pleadings in favor of the physician-defendant, wrote as follows:

"We believe that our legislature unquestionably had a rational basis for enacting section 8305. Senator Rocks provided the following viewpoint during debate on this legislation:

> 'this is the intent of what the wrongful birth and wrongful life legislation is about to stop a court engendered policy which views the birth of a child, be that child handicapped or otherwise, as a damaging event for which someone should be punished in order to prevent this quality of life ethic from becoming so pervasive that a handicapped child is routinely considered better off dead and of less value than what we would call a 'normal child' and to prevent the practice of medicine especially obstetrics and gynecology, from becoming coerced into accepting eugenic abortion as a condition for avoiding what are particularly wrongful birth lawsuits.' Pa. Senate leg. 1961 (March 22, 1988).

Appendix D

Other proffered rationale for this statute are also persuasive. The legislature believed that it would be improper to view any birth as an evil or wrong, and thus a cause of action. Secondly, our society has become increasingly aware and protective of the rights of the handicapped. To recognize the validity of a wrongful life statute would be to make the handicapped a lower class of citizen. Third, the recognition of these type causes of action by the legislature would, in essence, have dictated to the medical profession how to practice in the area of obstetrics. Finally, a recognition of these causes of action would have caused every increasing malpractice insurance rates to increase exponentially, with a resulting loss of adequate medical care in this vital area. See Pa. House Leg. 2306 (February 24, 1988).

We believe that section 8305 has a rational basis designed to meet a legitimate state interest. The legislature has not opted to make physicians exempt for their wrongdoings. Rather, the legislature has validly freed physicians from liability for defects or handicaps for which the physician is in no way responsible.

We are persuaded by the arguments of Justice Nix in the *Speck* decision. See 439 A.2d at 118, 120-21. We agree with Justice Nix that '. . . any intimation that a recognition is required of these proffered causes of action because of constitutional mandate is completely without foundation.' 439 A.2d at 120. '. . . [T]here can be no question that refusal to create new tort liability does not constitute protected access to interference with the constitutionally protected access to abortion.' 439 A.2d at 120.

We believe that the refusal of our legislature to recognize a cause of action for wringful birth and wrongful life 'does not impede the decision of the parents' regarding procreation, nor does it impede a women's right to choose to have an abortion. See *Speck*, 439 A.2d at 121"

APPENDIX E — OPINION OF JUDGE DAVID S. CERCONE DATED JUNE 28, 1991

IN THE COURT OF COMMON PLEAS OF
ALLEGHENY COUNTY, PENNSYLVANIA

CIVIL DIVISION

NO. GD 89-18962

LOUIS EDMONDS, a minor by TANEIKA JAMES, mother and natural guardian, and TANEIKA JAMES, in her own right,

Plaintiffs,

vs.

WYNNE COOPER, M.D.,

Defendant.

OPINION

By: David S. Cercone, J.
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Appendix E

IN THE COURT OF COMMON PLEAS OF
ALLEGHENY COUNTY, PENNSYLVANIA

CIVIL DIVISION

NO. GD 89-18962

LOUIS EDMONDS, a minor by TANEIKA JAMES, mother and natural guardian, and TANIEKA JAMES, in her own right,

Plaintiffs,

vs.

WYNNE COOPER, M.D.,

Defendant.

OPINION

By: David S. Cercone, J.

Plaintiff has appealed from our order granting Defendant's Motion for Judgment on the Pleadings in a case involving claims for wrongful birth and wrongful life.

Plaintiffs allege that Plaintiff-Mother, a teenager, obtained the services of Defendant after learning that she was pregnant. Plaintiffs allege that sonograms administered to Plaintiff-Mother revealed abnormalities to Plaintiff-Child. Plaintiff-Mother contends that she would have terminated her pregnancy if she had been advised in a timely fashion of the potential for these abnormalities. Plaintiff-Mother does *not* allege that this fact was ever communicated to Defendant. Plaintiff-Child, who was ultimately born with birth defects, alleges that the would be better off had he not been born.

Appendix E

42 Pa. C.S. Section 8305 provides as follows:

> (a) Wrongful birth — There shall be no cause of action or award of damages on behalf of any person based on a claim that, but for an act or omission of the defendant, a person once conceived would not or should not have been born. Nothing contained in this subsection shall be construed to prohibit any cause of action or award of damages for the wrongful death of a woman, or on account of physical injury suffered by a woman or a child, as a result of an attempted abortion. Nothing contained in this subsection shall be construed to provide a defense against any proceeding charging a health care practitioner with intentional misrepresentation under the act of October 5, 1978 (P.L. 1109, No. 261), known as the Osteopathic Medical Practice Act,[1] the act of December 20, 1985 (P.L. 457, No. 112), known as the Medical Practice Act of 1985,[2] or any other act regulating the professional practices of health care practitioners.
>
> (b) Wrongful life — There shall be no cause of action on behalf of any person based on a claim of that person that, but for an act of omission of the defendant, the person would not have been conceived or, once conceived, would or should have been aborted.

---

1. 63 P.S. § 271.1 et. seq.

2. 63 P.S. § 422.1 et seq.

Appendix E

(c) Conception — A person shall be deemed to be conceived at the moment of fertilization.

1988, April 13, P.L. 336, No. 47, § 2, imd. effective.

Present law, if constitutional, clearly precludes Plaintiff's causes of action. *See Butler v. Rolling Hill Hospital,* 382 Pa. Super. 330, 555 A.2d 205, 207 (1989), appeal denied, 522 Pa. 623, 564 A.2d 915.

Plaintiffs challenge the constitutionality of this section, relying in part on *Speck v. Finegold,* 497 Pa. 77, 439 A.2d 110 (1981). The *Speck* decision predated the legislative enactment of section 8305. Further, *Speck* did not recognize the causes of action sought to be pursued by plaintiffs. Rather, an evenly divided court upheld the lower court's dismissal of a cause of action for "wrongful life."

Plaintiffs allege that Defendant was negligent or reckless by failing to advise Plaintiff-Mother of her ability to terminate the pregnancy, and that by failing to so advise, Defendant denied Plaintiff-Mother the full opportunity to decide whether to abort or whether to carry her child to term. Plaintiffs, in essence, allege that doctors have the affirmative duty of explaining the potential for abortion, even where not raised by the patient. Plaintiffs also allege that doctors have the affirmative duty of explaining the potential for abortion, even where not raised by the patient. Plaintiffs also allege that the wrongful birth statute interferes with the patient's procreative decision and a women's right to choose whether to have an abortion, and is in violation of the equal protection clause. We believe that Plaintiffs contentions are without merit.

Appendix E

Plaintiffs concede that our legislature enjoys wide latitude in regulating tort actions and approving or disapproving new cause of action. Our legislature has seen fit to disapprove of the causes of action advanced by Plaintiffs.

We believe that our legislature unquestionably had a rational basis for enacting section 8305. Senator Rocks provided the following viewpoint during debate on this legislation:

> "this is the intent of what the wrongful birth and wrongful life legislation is about to stop a court engendered policy which views the birth of a child, be that child handicapped or otherwise, as a damaging event for which someone should be punished in order to prevent this quality of life ethic from becoming so pervasive that a handicapped child is routinely considered better off dead and of less value than what we would call a 'normal child' and to prevent the practice of medicine especially obstetrics and gynecology, from becoming coerced into accepting eugenic abortion as a condition for avoiding what are particularly wrongful birth lawsuits." Pa. Senate leg. 1961 (March 22, 1988).

Other proffered rationale for this statute are also persuasive. The legislature believed that it would be improper to view any birth as an evil or wrong, and thus a cause of action. Secondly, our society has become increasingly aware and protective of the rights of the handicapped. To recognize the validity of a wrongful life statute would be to make the handicapped a lower class of citizen. Third, the recognition of these type causes of action by the

legislature would, in essence, have dictated to the medical profession how to practice in the area of obstetrics. Finally, a recognition of these causes of action would have caused ever increasing malpractice insurance rates to increase exponentially, with a resulting loss of adequate medical care in this vital area. See Pa. House Leg. 2306 (February 24, 1988).

We believe that section 8305 has a rational basis designed to meet a legitimate state interest. The legislature has not opted to make physicians exempt for their wrongdoings. Rather, the legislature has validly freed physicians from liability for defects or handicaps for which the physician is in no way responsible.

We are persuaded by the arguments of Justice Nix in the *Speck* decision. See 439 A.2d at 118, 120-21. We agree with Justice Nix that ". . . any intimation that a recognition is required of these proffered causes of action because of constitutional mandate is completely without foundation." 439 A.2d at 120. ". . . [T]here can be no question that refusal to create new tort liability does not constitute governmental interference with the constitutionally protected access to abortion." 439 A.2d at 120.

We believe that the refusal of our legislature to recognize a cause of action for wrongful birth and wrongful life "does not impede the decision of the parents" regarding procreation, nor does it impede a women's right to choose to have an abortion. See *Speck*, 439 A.2d at 121.

For the within reasons, judgment on the pleadings was properly entered for Defendant.

BY THE COURT:
s/ D. Cercone, J.

Date: June 28, 1991

APPENDIX F — MEMORANDUM OPINION OF JUDGE JAMES H. MCLEAN DATED JANUARY 22, 1991

IN THE COURT OF COMMON PLEAS OF
ALLEGHENY COUNTY, PENNSYLVANIA

CIVIL DIVISION

NO. GD 90-16421

LOUIS EDMONDS, a minor by TANEIKA JAMES, mother and natural guardian, and TANEIKA JAMES, in her own right,

Plaintiffs,

vs.

THE WESTERN PENNSYLVANIA HOSPITAL, RADIOLOGY ASSOCIATES of WESTERN PENNSYLVANIA, P.C., NEAL B. SIMMONS, M.D., and HARVEY L. NEIMAN, M.D.,

Defendants.

MEMORANDUM OPINION

MOTIONS

Filed by the Honorable
James H. McLean

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Appendix F

IN THE COURT OF COMMON PLEAS OF
ALLEGHENY COUNTY, PENNSYLVANIA

CIVIL DIVISION

NO. GD 90-16421

LOUIS EDMONDS, a minor by TANEIKA JAMES, mother and natural guardian, and TANEIKA JAMES, in her own right,

Plaintiffs,

vs.

THE WESTERN PENNSYLVANIA HOSPITAL, RADIOLOGY ASSOCIATES of WESTERN PENNSYLVANIA, P.C., NEAL B. SIMMONS, M.D., and HARVEY L. NEIMAN, M.D.,

Defendants.

McLEAN, JR. January 22, 1991

MEMORANDUM OPINION

In early June of 1988 Plaintiff Taneika James learned that she was pregnant. On October 25, 1988 and December 27, 1988 she underwent sonography. The December 27, 1988 sonogram showed the existence of a porencephalic cyst. On February 12, 1989 Ms. James went into labor and her child Louis Edmonds was delivered by Caesarean section. Louis was diagnosed as suffering from quadrigeminal arachnoid cysts as well as hydrocephalus, conditions which will require medical attention throughout his life.

Ms. James brought this suit on behalf of herself and her son alleging that the child's adnormalities were apparent from the October 1988 sonogram but were not communicated to Ms. James'

obstetrician until the time for Ms. James to have legally aborted her pregnancy was passed. Ms. James claims that as a result of this negligence she was deprived of her opportunity to choose whether to terminate the pregnancy, was subjected to the pain and trauma of amniocentesis on two occasions as well as the suffering of childbirth, and will continue to be subjected to the pain, anxiety and inconvenience attendant on caring for a hydrocephalic child. On behalf of Louis, Ms. James seeks recovery for the suffering associated with his condition.

Preliminary Objections were brought by all Defendants on the basis that the Complaint fails to state a cause of action in light of 42 Pa. CSA § 8305. On November 30, 1990 the Preliminary Objections were sustained as to all Defendants.

In Pennsylvania claims for wrongful birth or wrongful life are specifically prohibited by statute, 42 Pa. CSA § 8305.

Section 8305(a) states:

> Wrongful birth. — There shall be no cause of action or award of damages on behalf of any person based on a claim that, but for an act or omission of the defendant, a person once conceived would not or should not have been born.

Section 8305(b) states:

> Wrongful life. — There shall be no cause of action on behalf of any person based on a claim of that person that, but for an act or omission of the defendant, the person would not have been

conceived or, once conceived, would or should have been aborted.

Plaintiffs concede that their cause of action comes within the ambit of 42 Pa. CSA § 8305 but contend that the statute is unconstitutional and therefore should not bar their right to relief. While cognizant of the suffering attendant upon bearing a child with physical defects, the Court is also aware that in this case the child's problems were not initially caused by any act of the defendants and were not preventable by any means less drastic than abortion. Especially since the statute barring suits for wrongful birth and wrongful life has been upheld despite constitutional challenge, *Butler v. Rolling Hill Hospital,* 555 A.2d 205 (Pa. Super. 1989), it must operate to bar this action.

For the foregoing reasons the order of November 30, 1989 should stand.

APPENDIX G — ORDER OF COURT OF THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA DATED NOVEMBER 30, 1991

IN THE COURT OF COMMON PLEAS OF
ALLEGHENY COUNTY, PENNSYLVANIA

CIVIL DIVISION

NO. GD 90-16421

LOUIS EDMONDS, a minor by TANEIKA JAMES, mother and natural guardian, and TANEIKA JAMES, in her own right,

Plaintiffs,

vs.

THE WESTERN PENNSYLVANIA HOSPITAL, RADIOLOGY ASSOCIATES of WESTERN PENNSYLVANIA, P.C., NEAL B. SIMMONS, M.D., and HARVEY L. NEIMAN, M.D.,

Defendants.

ORDER OF COURT

Sustaining Preliminary
Objections

Filed by the Honorable
James H. McLean

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Appendix G

IN THE COURT OF COMMON PLEAS OF
ALLEGHENY COUNTY, PENNSYLVANIA

CIVIL DIVISION

NO. GD 90-16421

LOUIS EDMONDS, a minor by TANEIKA JAMES, mother and natural guardian, and TANEIKA JAMES, in her own right,

Plaintiffs,

vs.

THE WESTERN PENNSYLVANIA HOSPITAL, RADIOLOGY ASSOCIATES of WESTERN PENNSYLVANIA, P.C., NEAL B. SIMMONS, M.D., and HARVEY L. NEIMAN, M.D.,

Defendants.

ORDER OF COURT

AND NOW, to-wit, this 30th day of November, 1990, upon consideration of Preliminary Objections filed by all Defendants, it it hereby ORDERED that said Preliminary Objections are sustained.

BY THE COURT:

s/ McLean, J.

No. 92-1819

Supreme Court, U.S.
FILED
JUN 11 1993
OFFICE OF THE CLERK

In The

Supreme Court of the United States

LOUIS EDMONDS, a minor by TANEIKA JAMES, mother and natural guardian, and TANEIKA JAMES, in her own right,
Petitioners,

vs.

THE WESTERN PENNSYLVANIA HOSPITAL, RADIOLOGY ASSOCIATES OF WESTERN PENNSYLVANIA, P.C., NEAL B. SIMMONS, M.D. and HARVEY L. NEIMAN, M.D.,
Respondents.

LOUIS EDMONDS, a minor by TANEIKA JAMES, mother and natural guardian and TANEIKA JAMES, in her own right,
Petitioners,

vs.

WYNNE COOPER, M.D.,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Pennsylvania

BRIEF IN OPPOSITION FOR RESPONDENTS RADIOLOGY ASSOCIATES OF WESTERN PENNSYLVANIA, P.C. AND HARVEY L. NEIMAN, M.D.

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER PETITIONER LACKS STANDING TO BRING A JUSTICIABLE CLAIM BEFORE THIS COURT?

II. WHETHER 42 Pa. C.S. § 8305(a) IS CONSTITUTIONAL AS IT DOES NOT THROUGH STATE ACTION DENY DUE PROCESS OR EQUAL PROTECTION AND IS RATIONALLY RELATED TO A LEGITIMATE STATE INTEREST?

III. WHETHER THERE IS A LACK OF DECISIONAL CONFLICT BETWEEN UNITED STATES COURTS OF APPEALS SUCH THAT THIS COURT SHOULD NOT EXERCISE ITS JUDICIAL DISCRETION TO ISSUE A WRIT OF CERTIORARI?

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I. Petitioner lacks standing to bring a justiciable claim before this Court. 3

II. 42 Pa. C.S. § 8305(a) is constitutional as it does not through state action deny due process or equal protection and is rationally related to a legitimate state interest. 6

III. There is no decisional conflict between United States Courts of Appeals such that this Court should exercise its judicial discretion to issue a writ of certiorari. 8

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APPENDIX

Appendix A — Complaint in Civil Action G.D. 90-16421 ..... 1a

No. 92-1819

Supreme Court of the United States

October Term, 1992

LOUIS EDMONDS, a minor by TANEIKA JAMES, mother and natural guardian, and TANEIKA JAMES, in her own right,

Petitioners,

vs.

THE WESTERN PENNSYLVANIA HOSPITAL, RADIOLOGY ASSOCIATES OF WESTERN PENNSYLVANIA, P.C., NEAL B. SIMMONS, M.D. and HARVEY L. NEIMAN, M.D.,

Respondents.

LOUIS EDMONDS, a minor by TANEIKA JAMES, mother and natural guardian and TANEIKA JAMES, in her own right,

Petitioners,

vs.

WYNNE COOPER, M.D.,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Pennsylvania

---

BRIEF IN OPPOSITION FOR RESPONDENTS RADIOLOGY ASSOCIATES OF WESTERN PENNSYLVANIA, P.C. AND HARVEY L. NEIMAN, M.D.

COUNTER-STATEMENT OF THE CASE

Taneika James' (petitioner) wrongful birth lawsuit stems from respondents' alleged failure to more promptly report to her the results of an October 25, 1988 sonogram (Respondents' Appendix, p. 11a). This sonogram was reported as showing a fetal abnormality (a cranial cyst) in petitioner's fetus whose mean gestational age at that time was 25.3 weeks (Respondents' Appendix, p. 6a).

Petitioner alleges she was not provided with the benefit of this information until December 29, 1988, a time too late to consider the option of abortion; she further contends that such option existed on October 25, 1988 (Respondents' Appendix, pp. 6a, 9a & 12a).

As a result, petitioners filed causes of action for wrongful birth (Taneika James in her right) and wrongful life (Taneika James as mother and natural guardian of Louis Edmonds). Respondents successfully challenged the existence of these causes of actions by raising the bar provided for by Pennsylvania's Wrongful Birth and Wrongful Life Statute (42 Pa. C.S. § 8305(a) and (b)). Petitioners long ago abandoned their right to challenge the dismissal of their wrongful life claim, opting instead to contest only the constitutionality of Pennsylvania's Wrongful Birth Provision (42 Pa. C.S. § 8305(a)) (*See* Petitioners' Appendix D, p. 12a).

SUMMARY OF ARGUMENT

Petitioner fails to bring a justiciable case or controversy to this Court. She lacks standing to do so as she has suffered no injury in fact as a result of the enactment of Pennsylvania's Wrongful Birth Act, 42 Pa. C.S. § 8305(a). If the case is justiciable, Pennsylvania's Wrongful Birth Act is a proper constitutional exercise of the legislature's right to enact legislation rationally related to its

legitimate interest in valuing life over death. The Wrongful Birth Act does not foster state action which directly impacts upon a woman's right to exercise the option of abortion.

No conflict among the United States Courts of Appeals exists regarding the constitutionality of wrongful birth statutes as the one enacted by the Pennsylvania legislature. There is no reason for this Court to exercise its judicial discretion to grant the petition.

REASONS FOR DENYING THE WRIT

I.

PETITIONER LACKS STANDING TO BRING A JUSTICIABLE CLAIM BEFORE THIS COURT.

As an Article III Court[1], only justiciable claims made by parties with standing may properly come before this Court. *Flast v. Cohen,* 392 U.S. 83, 94-95 (1968). A litigant who lacks standing deprives this Court of the power to adjudicate a case or controversy. *Id.* at 101; *Association of Data Processing Services Organizations v. Camp,* 397 U.S. 150, 151-152 (1970).

As this Court has previously stated:

> The essence of the standing inquiry is whether the parties seeking to invoke the court's jurisdiction have "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult

1. U.S. Const. art. III.

> constitutional questions." As refined by subsequent reformulation, this requirement of a "personal stake" has come to be understood to require not only a "distinct and palpable injury," to the plaintiff, but also a "fairly traceable" causal connection between the claimed injury and the challenged conduct. (Citations omitted.)

Duke Power Company v. Carolina Environmental Study Group, Inc., et al., 438 U.S. 59, 72 (1978). Moreover, the moving party must be able to show that the relief she seeks would prevent or redress her injury. *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 38 (1976).

Such is not the case here. Petitioner cannot show a distinct and palpable injury in fact arising out of the Pennsylvania legislature's enactment of 42 Pa. C.S. § 8305(a). Therefore, she lacks standing to bring this case before this Court challenging the constitutionality of 42 Pa. C.S. § 8305(a).

The linchpin of petitioner's claim upon which she presupposes a right to constitutionally attack this statutory provision is that at the time of the negligent conduct by respondents she was possessed of privacy rights expounded upon in *Roe v. Wade*, 410 U.S. 113 (1973) and its progeny regarding the choice of aborting her fetus (Petition for Writ of Certiorari at pp. 15-16, 18). And, but for this statutory provision she would have a cause of action against respondents for wrongful birth or the respondents would have been more careful in promptly providing her with the necessary information to exercise her option of abortion (Petition for Writ of Certiorari, pp. 8, 14).

The fatal flaw of petitioner's argument is that she was not possessed of a right of choice to abort under *Roe v. Wade* and its

progeny on October 25, 1988. By her own admission, the age of the fetus was 25.3 weeks.[2] Under *Roe's* analysis there was a presumption of viability of the fetus at the time of the alleged negligent conduct by the respondents such that she had no choice concerning abortion absent strong evidence that failure to do so would compromise her life or health.[3] *Roe v. Wade, supra* at 160. The petitioner has made no claim that a threat to her life or health existed by carrying the fetus to term.

As petitioner was without a choice, she cannot be said to have suffered an injury in fact. Assuming for argument's sake that 42 Pa. C.S. § 8305(a) is constitutionally infirm, the petitioner can show no injury to herself that is likely to be redressed by a favorable decision. She lacks standing and is before this Court merely for an advisory opinion. This is impermissible.

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2. With only passing reference on one occasion does petitioner mention in her petition anything about the gestational age of the fetus at the time of the injury causing conduct. On page 18 appears the statement, "In the instant case . . . the negligence occurred prior to viability."

3. Indeed, at the time of the alleged injury causing conduct on October 25, 1988, a provision in Pennsylvania's Abortion Control Act (1982, June 11, P.L. 476, No. 138) made it a third degree felony to perform or induce an abortion when the fetus is viable absent a threat to maternal life or health. 18 Pa. C.S.A. § 3210(a).

II.

42 Pa. C.S. § 8305(a) IS CONSTITUTIONAL AS IT DOES NOT THROUGH STATE ACTION DENY DUE PROCESS OR EQUAL PROTECTION AND IS RATIONALLY RELATED TO A LEGITIMATE STATE INTEREST.

Petitioner's constitutional attacks on 42 Pa. C.S. § 8305(a) as violative of the Fourteenth Amendment's due process and equal protection provisions must fail as there is no state action. In order for there to be a Fourteenth Amendment violation, petitioner must show state action or involvement with the respondents' alleged denial of her right to abortion. *Shelley v. Kraemer,* 344 U.S. 1 (1948).

State action here would entail a direct affect or imposition of a significant burden on petitioner's right to an abortion. *Planned Parenthood v. Ashcroft,* 462 U.S. 476 (1983); *Maher v. Roe,* 432 U.S. 464 (1977). Legislation which does not place a government obstacle in the path of a woman who chooses to terminate her pregnancy will not be deemed unconstitutional. *Harris v. McRae,* 448 U.S. 297 (1980); *see Dansby v. Thomas Jefferson Hospital, et al.,* 1993 Pa. Super. Lexis 950 (March 19, 1993) (finding 42 Pa. C.S. § 8305(a) withstood constitutional challenge on equal protection grounds). In fact, although the government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its own creation. *Harris v. McRae, supra* at 316.

42 Pa. C.S. § 8305(a) does not regulate or directly affect the private decisions or agreements between patients and their physicians. A pregnant woman is no less free to exercise her right of choice since the passage of this statute. This statute does not restrict her right to an abortion or authorize action which impedes

it. *See, Dansby v. Thomas Jefferson Hospital, supra* at 4; *see also, Hickman v. Group Health Plan,* 396 N.W. 2d 10, 13 (Minn. 1986) (upholding the constitutionality of Minnesota's similar Wrongful Birth Act from due process and equal protection challenges on, *inter alia,* the ground that state action was lacking); and *Campbell v. United States,* 962 F.2d 1579, 1583 (11th Cir. 1992), *certiorari denied,* 61 U.S.L.W. 3581, 3583 (U.S. Feb. 23, 1993) (upholding from due process and equal protection challenges the State of Georgia's Supreme Court's bar of wrongful birth claims). As the Court of Appeals in *Campbell* stated:

> Georgia has not commanded doctors to interfere with a woman's constitutional rights. Georgia's reluctance to interject itself into the private relations of its citizens cannot be construed as affirming or encouraging private conduct for purposes of the Fourteenth Amendment. To find state action whenever a state has not acted would broaden state action to encompass practically all private conduct . . . [T]he Fourteenth Amendment regulates the relationship between the state and its citizens, not the private relations between citizens. (Citation omitted.)

Id. at 1583.

As the court below stated, the statutory provision called into question "merely extinguishes all causes of actions arising from a claim that but for the improper conduct of a medical provider, a child would have been aborted prior to birth." *Edmonds v. Western Pennsylvania Hospital,* 414 Pa. Super. 567, 607 A.2d 1083, 1087 (1992). Pennsylvania is expressing its legitimate interest in life over death, suggesting by this legislation that it will not recognize the birth of a child to be a damaging event for which someone

should be punished when this someone does not cause conception or injury. *Id.*, 607 A.2d at 1088 (concurring opinion of Wieand, J.).

As there is no state action obstructing petitioner's abortion choice by passage of 42 Pa. C.S. § 8305(a) and as it bears a rational relationship to a legitimate state interest[4], it is constitutional.

III.

THERE IS NO DECISIONAL CONFLICT BETWEEN UNITED STATES COURTS OF APPEALS SUCH THAT THIS COURT SHOULD EXERCISE ITS JUDICIAL DISCRETION TO ISSUE A WRIT OF CERTIORARI.

Petitioner cites decisions from two United States Courts of Appeals suggesting they pose a decisional conflict on which this Court should exercise its discretionary review pursuant to Supreme Court Rule No. 10.1(a). *See Campbell v. United States, supra* and *Robak v. United States,* 658 F.2d 471 (7th Cir. 1981). Contrary to petitioner's contentions, these cases are not in conflict on the same matter.

The United States Court of Appeals in *Robak* was faced with the narrow issue of anticipating whether the state of Alabama would recognize a wrongful birth cause of action (as its legislature and courts were silent on this issue) since the Court of Appeals was obligated to look to it to determine if the plaintiffs had a cause of action under the Federal Tort Claims Act (28 U.S.C. § 2671 *et seq.*). 658 F.2d at 474. The *Robak* court was dealing with the expanse of

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4. *See Dansby v. Thomas Jefferson Hospital, supra* at 4-5 ("Pennsylvania's wrongful birth statute is rationally designed to meet a legitimate state interest. Not only does it reflect the state's view that a handicapped child should not be deemed better off dead and of less value than a "normal" child, but it also reflects a refusal to dictate to the medical profession how to practice in the field of obstetrics").

state tort actions. As Alabama had not spoken on this issue, the court of appeals looked to sister states for guidance and concluded that a wrongful birth cause of action would be recognized in Alabama. *Id.* at 475-476.

In *Campbell v. United States, supra,* (as with *Robak* a cause of action for medical malpractice under FTCA), the Court of Appeals was faced with the question of whether the state of Georgia's existing decisional law barring a wrongful birth cause of action was constitutional. Here, the Georgia Supreme Court had already decided what the state's position on wrongful birth was. The Court of Appeals was simply asked to determine if the Georgia Supreme Court's decision was constitutional. It limited its analysis to the question whether there was state action obstructing a woman's right to abortion.

The *Campbell* court held there was no state action, stating:

> The state's decision not to recognize a cause of action for private conduct does not transform that conduct into state action. This is a classic tort action between a private plaintiff and the United States acting as a private employer. Since the plaintiffs have failed to allege a cause of action under Georgia law, the district court's judgment of dismissal is AFFIRMED.

Id. at 1584. It is interesting to note the similarity of issues between the *Campbell* case and the case now before this Court. Certiorari was denied in *Campbell* on February 23, 1993.[5]

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5. Another similar case on which certiorari was denied is *Azzolino v. Dingfelder,* 315 N.C. 103, 337 S.E. 2d (1985), *certiorari denied,* 479 U.S. 835 (1986), *rehearing denied,* 319 N.C. 227, 353 S.E. 2d 401 (1987).

Clearly, the United States Courts of Appeals in *Campbell* and *Robak* are not in conflict as they address different issues of state tort claims. Petitioner improperly attempts to create a conflict where none exists simply for the purpose of meeting one of the guidelines under Supreme Court Rule 10.1.

CONCLUSION

Petitioner lacks standing to bring a real case or controversy before this Court. She cannot show injury in fact caused by the affects of 42 Pa. C.S. § 8305(a). Any privacy right in choosing abortion over birth had passed at the time of respondents' alleged injury causing conduct. Her fetus was viable and there was no threat to maternal life or health. Therefore, 42 Pa. C.S. § 8305(a) could not have denied her a choice of abortion where no choice existed.

Assuming justiciability exists, 42 Pa. C.S. § 8305(a) did not prompt state action denying petitioner a right of choice in child birth matters. It neither regulated nor directly affected these rights.

Finally, no conflict among the United States Courts of Appeals exists concerning the constitutionality of wrongful birth statutes like that enacted by the Pennsylvania legislature. This case presents no issue upon which this Court should exercise its judicial discretion to grant a writ of certiorari.

Respondents respectfully request that this Court deny petitioner's request for a writ of certiorari to the Supreme Court of Pennsylvania.

Respectfully submitted,

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APPENDIX A — COMPLAINT IN CIVIL ACTION
G.D. 90-16421

IN THE COURT OF COMMON PLEAS OF
ALLEGHENY COUNTY, PENNSYLVANIA

CIVIL DIVISION

No. GD 90-16421

LOUIS EDMONDS, a minor, by TANEIKA JAMES, mother and natural guardian, and TANEIKA JAMES, in her own right,

Plaintiffs,

vs.

THE WESTERN PENNSYLVANIA HOSPITAL, RADIOLOGY ASSOCIATES OF WESTERN PENNSYLVANIA, P.C., NEAL B. SIMMONS, M.D., and HARVEY L. NEIMAN, M.D.,

Defendants.

COMPLAINT IN CIVIL ACTION

Code: 007

Filed on Behalf of:
Plaintiffs.

Appendix A

Counsel of Record for this Party:

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JURY TRIAL DEMANDED

Appendix A

NOTICE TO DEFEND

You have been sued in Court. If you wish to defend against the claims set forth in the following pages, you must take action within twenty (20) days after this complaint and notice are served, by entering a written appearance personally, or by an attorney, and filing in writing with the Court your defenses or objections to the claims set forth against you. You are warned that if you fail to do so the case may proceed without you, and a judgment may be entered against you by the court without further notice for any money claimed in the complaint or for any claim or relief requested by the plaintiff. You may lose money or property or other rights important to you.

YOU SHOULD TAKE THIS PAPER TO YOUR LAWYER AT ONCE. IF YOU DO NOT HAVE OR KNOW A LAWYER, THEN YOU SHOULD GO TO OR TELEPHONE THE OFFICE SET FORTH BELOW TO FIND OUT WHERE YOU CAN GET LEGAL HELP.

LAWYER REFERRAL SERVICE:

The Allegheny County Bar Association
920 City-County Building
Pittsburgh, PA 15219
(412) 261-0518

Appendix A

COMPLAINT IN CIVIL ACTION

1. At all times material, plaintiff, Louis Edmonds (plaintiff-child) was and is an individual, infant, male child, born to his mother, Taneika James and is presently residing with plaintiff-mother in Pittsburgh, Allegheny County in the Commonwealth of Pennsylvania.

2. At all times material, plaintiff-mother, Taneika James, was an is an individual residing in Pittsburgh, Allegheny County in the Commonwealth of Pennsylvania.

3. At all times material, the defendant, The Western Pennsylvania Hospital was and is a hospital located in Pittsburgh, Allegheny County, Pennsylvania and the defendant, Radiology Associates of Western Pennsylvania, P.C. was an is an professional corporation with its office and principal place of business at the Western Pennsylvania Hospital at Pittsburgh, Allegheny County, Pennsylvania. At all times material, defendants, Neal B. Simmons, M.D. and Harvey L. Neiman, M.D. were and are individuals licensed to practice medicine, and specializing in the field of radiology, and at all times material they were and are agents, servants or employees of the defendant Radiology Associates of Western Pennsylvania, P.C.

4. At all times material a certain arrangement existed between Radiology Associates of Western Pennsylvania, P.C. and the Western Pennsylvania Hospital whereby the defendant Radiology Associates of Western Pennsylvania, P.C. rendered certain radiology services, including sonographic services, to the public at the defendant, The Western Pennsylvania Hospital.

5. At all times material, the applicable standard of care

required each of the defendants to convey in a timely manner to a physician who ordered sonographic studies on a patient the results of the sonographic studies performed.

6. At all times material, the applicable standard of care required all four defendants to convey by telephone to a physician who ordered sonographic studies performed upon a patient of the physician, the results of the sonographic studies performed upon the patient, when the studies revealed an abnormality. Said standard of care required that the results of said studies be conveyed by telephone or by some other expedited manner to the physician who ordered the studies.

7. Plaintiff-mother believes and avers that on or about June 8, 1988, she learned for the first time that she was pregnant. Plaintiff-mother was examined and followed by a certain physician or physicians who ordered the performance of a sonogram.

8. On or about October 25, 1988, sonography was performed upon plaintiff-mother. Plaintiff mother had no reason to believe that the sonogram performed on October 25, 1988 differed from a sonogram taken in August, 1988 and at all times, plaintiff-mother believed that the sonogram showed the normal development of her child.

9. Plaintiff-mother believes and avers that none of the defendants, or anyone upon their behalf conveyed in a timely manner, either by telephone, or otherwise to the physician attending plaintiff-mother, which physician had ordered the sonogram of October 25, 1988, the results of said sonogram. As such, plaintiff-mother did not know or have reason to know of any fetal abnormality in October or November, 1988.

10. Plaintiff-mother believes and avers that the findings or results of the October 25, 1988 sonogram did in fact show a fetal abnormality. Plaintiff-mother avers that a high quality comprehensive study was performed on October 25, 1988 which demonstrated a cystic structure (porencephalic cyst) in the region of the hippocampus of plaintiff-child, which measure 1.9 x 2.1 x an uncertain height. At the time of the sonogram, plaintiff child's compatible gestation age was 25.3 weeks with a range of 23.5 to 26.9 weeks.

11. On or about December 12, 1988, plaintiff-mother was again examined by her attending physician, and a sonogram was scheduled for December 27, 1988 at defendant The Western Pennsylvania Hospital. A sonogram was performed on December 27, 1988 which confirmed the presence of a porencephalic cyst, but enlarged since the previous sonogram.

12. Plaintiff-mother believes and avers that during the sonogram of December 27, 1988, two technicians or agents, servants or employees of the hospital indicated that they had observed something concerning the baby's brain. Plaintiff-mother requested additional information from the technicians, however, plaintiff-mother was told to discuss and review the results with her physician.

13. Plaintiff-mother avers that she attempted to discuss this sonogram with her attending physician at her next appointment with her attending physician on December 29, 1988 and requested that her attending physician determine whether or not the test was normal. It was at this time that plaintiff-mother was informed of the presence of a cyst on her child's head or brain and that she had not been informed of the presence of said cyst until her appointment with said Physician on or about December 29, 1988. Plaintiff-mother was then referred to a genetic clinic for evaluation.

14. Plaintiff-mother believes and avers that her attending physician desired to schedule an amniocentesis for two weeks from December 27, 1988. However, plaintiff-mother's mother insisted upon an immediate amniocentesis and as such, one was performed on January 3, 1989.

15. Plaintiff-mother believes and avers as a result of the performance of the amniocentesis on January 3, 1989, plaintiff-mother was subjected to premature labor for approximately six hours wherein plaintiff-mother was given medication to prevent the delivery of her child and cease contractions. Plaintiff-mother avers that she was not given any medications to reduce the pain and suffering she experienced while in premature labor on January 3, 1989.

16. Plaintiff-mother believes and avers that a second amniocentesis was performed on or about January 16, 1989, along with other diagnostic testing, due to the fact that the prior amniocentesis performed on January 3, 1989 at defendant, the Western Pennsylvania Hospital, was not accurate for diagnostic purposes. As such, plaintiff-mother was again subjected to an amniocentesis on January 16, 1989.

17. As a result of the amniocentesis or other diagnostic testing performed on January 16, 1989, plaintiff-mother was again subjected to the pain and suffering accompanying premature labor for an approximate eight hour period of time. Again, no medications to reduce the pain and suffering experienced in the premature labor were given to plaintiff-mother and medications were given to plaintiff-mother again to terminate the contractions and stop the labor or delivery of the child.

18. On or about February 12, 1989, plaintiff-mother went into labor and at approximately 10:00 p.m. required an epidural and the

reactivation of the epidural three times. However, due to complications with the labor, plaintiff-child was delivered through Cesarean-Section. Subsequent to plaintiff-child's birth it was determined or diagnosed that plaintiff-child suffered from quadrigeminal arachnoid cysts as well as hydrocephalus.

19. Plaintiff-mother believes and avers that a ventriculoperitoneal shunt was placed due to the enlarged ventricles of plaintiff-child. On or about March 17, 1989, further surgical procedures needed to be performed wherein a left-sided quadrigeminal cistern arachnoid cyst to peritoneal shunt was inserted. Plaintiff-child was discharged on March 19, 1989.

20. Plaintiff-child has been subjected to additional surgical procedures, including but not limited to a procedure performed on April 14, 1989 wherein a new left sided VP shunt was placed by a physician. Plaintiff-mother believes and avers that further shunt revision or the placement of additional shunts have been performed since April, 1989 and continued periodic treatment and examination of plaintiff-child is required to continually rule-out the possibility of infection. Plaintiff-mother believes and avers that additional surgical or other medical procedures or shunt revisions will be required throughout plaintiff-child's life with the associated everyday concern as to whether or not infection will set into plaintiff-child's brain or body.

21. As a direct and proximate result of the conduct of defendants as referred to above and the negligence particulars set forth below, plaintiff-mother sustained the following injuries and damages, all of which may be continuing in nature and character:

a. Plaintiff-mother has been subjected to much emotional pain, suffering, inconvenience, anxiety, distress, depression and confusion;

Appendix A

b. She was forced to give birth to a child who would require extensive medical care throughout the child's life;

c. She was subjected to the physical and emotional pain, suffering, inconvenience and distress associated with at least two premature labor incidents, as well as associated with the labor and delivery of her child;

d. Plaintiff-mother was subjected to an unnecessary surgical procedure with associated risks and complications in the delivery of her child;

e. Plaintiff-mother was not given her rightful choice as to whether or not to terminate the pregnancy;

f. Plaintiff-mother had to completely alter her lifestyle due to the birth of said child and the extensive medical care and treatment required and which will be required.

g. Plaintiff-mother must live, day by day, with the reality and fear that her child's life expectancy is guarded;

h. Plaintiff-mother has lost he ability to enjoy a normal lifestyle with her child and has been and will be required to expend sums of money for past, present and future medical care for the child.

i. Plaintiff-mother has lost the ability to go about and enjoy her normal lifestyle subsequent to the birth of her child and will be unable to pursue the further development of her lifestyle, or such further development of it may be delayed.

Appendix A

22. As a direct and proximate result of the conduct of defendants as referred to above and the negligent particulars set forth below, plaintiff-child sustained the following injuries and damages, all of which may be continuing in nature and character:

a. Plaintiff-child has been subjected to much emotional and physical pain, suffering, inconvenience, anxiety and distress;

b. Plaintiff-child was subjected to premature labor on two separate occasions while in plaintiff-mother's womb, which created additional physical pain, suffering, inconvenience and distress;

c. Plaintiff-child was carried full term and was delivered on or about February 13, 1989 with severe fetal abnormalities and complications;

d. Plaintiff-child was subjected to many necessary surgical procedures with associated risks and complications subsequent to the delivery of plaintiff-child which include, but is not limited to the placement of shunts in his brain;

e. Plaintiff-child will in the future be subjected to the risks and complications associated with the surgery required to treat the condition from which he suffers and the replacement of shunts periodically through the remainder of his life;

f. Plaintiff-child has been and will be subjected to the risks and complications of infection, seizures and other disabilities which may cause him future injuries and damages and death;

g. Plaintiff-child has lost and will never gain the ability to enjoy a normal lifestyle and he will be required to expend or his guardian will be required to expend sums of money for past, present and future medical care required for plaintiff-child;

h. Further surgical procedures will be required upon plaintiff-child with the associated physical and emotional pain, suffering, inconvenience, distress, anxiety, embarrassment and humiliation;

i. Plaintiff-child has sustained a loss of life expectancy and a loss of potential learning capacity.

COUNT I — TORT
TANEIKA JAMES V. ALL DEFENDANTS

23. The allegations set forth in paragraphs 1 through 22 above are hereby incorporated by reference into Count I of this complaint as though the same were to be repeated at length herein.

24. At all times material, defendants had a duty of care to plaintiff-mother and to the fetus within her, which entailed the following:

a. To use all available means to determine the results of the October 25, 1988 sonogram;

b. To inform plaintiff-mother of the results of the October 25, 1988 sonogram in a timely manner; and

c. To provide accurate information to plaintiff mother on the condition of her unborn child to enable plaintiff-mother to make informed decisions on all possible alternatives.

d. To inform the plaintiff-mother's attending physician of the results of the October 25, 1988 sonogram in a timely manner.

25. Defendants breached all of the above mentioned duties of care to plaintiff-mother, and defendants' conduct, actions or omissions were negligent and careless in the following particulars:

a. In failing to inform plaintiff mother of the findings of the October 25, 1988 sonogram;

b. In failing to inform in a timely manner the physician attending to wife-mother (i.e. the physician who ordered the sonogram performed October 25, 1988) of the findings of the October 25, 1988 sonogram.

c. In failing to discuss in a timely manner with plaintiff-mother the results, alternatives, risks and complications associated with the results of the October 25, 1988 sonogram;

d. In failing to determine whether or not a report had been sent by any of the defendants and/or in failing to determine whether or not such a report had been received by plaintiff-mother's attending physician;

e. In failing to use all available means to convey in timely manner the results of the October 25, 1988 sonogram;

f. In otherwise failing to exercise that degree of care due and owing to plaintiff-mother under the circumstances;

g. In knowing or having reason to know that plaintiff-

mother's child had a fetal abnormality and in failing to inform plaintiff-mother immediately.

h. In knowing or having reason to know that plaintiff-mother's child had a fetal abnormality and in failing to inform plaintiff-mother's attending physician immediately.

26. As a direct and proximate result of the negligent or careless conduct of defendants as set forth above, plaintiff-mother has sustained those injuries and damages set forth in paragraphs 15, 16, 17, 18 and 21 above.

WHEREFORE, plaintiff-mother hereby demands judgment in her favor and against all defendants in an amount in excess of $20,000.00 and in an amount in excess of the jurisdiction of the Arbitration Division of the Court, plus costs.

COUNT II — TORT
LOUIS EDMONDS, A MINOR BY TANEIKA JAMES, MOTHER AND NATURAL GUARDIAN
V. ALL DEFENDANTS

27. The allegations set forth in paragraphs 1 through 26 above are hereby incorporated by reference into Count II of this Complaint.

28. At all times material, defendants had the duty of care to the plaintiff-child wherein said duty of care is set forth in paragraph 24 above.

29. All defendants breached all of the above mentioned duties of care to plaintiff-child and defendant's conduct, actions or

omissions were careless in the particulars which are set forth in Count I of the Complaint.

30. As a direct and proximate result of the negligence or carelessness of the defendants, plaintiff-child has sustained those injuries and damages as set forth in paragraphs 19, 20 and 22 above.

WHEREFORE, plaintiff-child hereby demands judgment in her favor and against all defendants in an amount in excess of $20,000.00 and in an amount in excess of the jurisdiction of the Arbitration Division of the Court, plus costs.

Respectfully submitted,
s/ Bruce S. Gelman
Bruce S. Gelman

Appendix A

§ 4904. Unsworn falsification to authorities.

(a) In general. — A person commits a misdemeanor of the second degree if, with intent to mislead a public servant in performing his official function, he:

(1) makes any written false statement which he does not believe to be true:

(2) submits or invites reliance on any writing which he knows to be forged, altered or otherwise lacking in authenticity; or

(3) submits or invites reliance on any sample, specimen, map, boundary mark, or other object which he knows to be false.

(b) Statements "under penalty."—A person commits a misdemeanor of the third degree if he makes a written false statement which he does not believe to be true, on or pursuant to a form bearing notice, authorized by law, to the effect that false statements made therein are punishable.

(c) Perjury provisions applicable. — Section 4902(c) through (f) of this title (relating to perjury) applies to this section.

1972, Dec. 6, P.L.—, No. 334, § 1, eff. June 6, 1973.

Appendix A

VERIFICATION

Now comes Taneikia James, Plaintiff in the civil action at which the foregoing document is intended to be filed of public record, who verifies that the facts set forth in the foregoing Civil Action are true and correct to the best of his/her knowledge, information and belief. This verification is made subject to the penalties of 18 Pa. C. S. § 4904, relating to unsworn falsification to authorities, which provides for criminal penalties if a person with intent to mislead makes a written false statement which he/she does not believe to be true.

Date: July 12, 1990 s/ Taneika M. James

Supreme Court, U.S.
FILED
JUN 11 1993
OFFICE OF THE CLERK

No. 92-1819

In The

Supreme Court of the United States

October Term, 1992

LOUIS EDMONDS, a minor by TANEIKA JAMES, mother and natural guardian, and TANEIKA JAMES, in her own right,
Petitioners,

vs.

THE WESTERN PENNSYLVANIA HOSPITAL, RADIOLOGY ASSOCIATES OF WESTERN PENNSYLVANIA, P.C., NEAL B. SIMMONS, M.D. and HARVEY L. NEIMAN, M.D.,
Respondents.

LOUIS EDMONDS, a minor by TANEIKA JAMES, mother and natural guardian, and TANEIKA JAMES, in her own right,
Petitioners,

vs.

WYNNE COOPER, M.D.,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Pennsylvania

BRIEF IN OPPOSITION FOR RESPONDENTS WESTERN PENNSYLVANIA HOSPITAL AND NEAL B. SIMMONS, M.D.

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QUESTIONS PRESENTED

I. WHETHER CERTIORARI IS PROPER GIVEN THE ABSENCE OF ANY CONFLICT AS REQUIRED BY RULE 10.1(a) OF THE RULES OF THE UNITED STATES SUPREME COURT OR FOR ANY OTHER REASON.

Answer: No.

II. WHETHER PENNSYLVANIA'S WRONGFUL BIRTH STATUTE SET FORTH IN 42 Pa. C.S.A. § 8305(a) PREVENTS A WOMAN FROM OBTAINING AN ABORTION?

Answer: No.

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No. 92-1819

In The

Supreme Court of the United States

October Term, 1992

LOUIS EDMONDS, a minor by TANEIKA JAMES, mother and natural guardian, and TANEIKA JAMES, in her own right,

Petitioners,

vs.

THE WESTERN PENNSYLVANIA HOSPITAL, RADIOLOGY ASSOCIATES OF WESTERN PENNSYLVANIA, P.C., NEAL B. SIMMONS, M.D. and HARVEY L. NEIMAN, M.D.,

Respondents.

LOUIS EDMONDS, a minor by TANEIKA JAMES, mother and natural guardian, and TANEIKA JAMES, in her own right,

Petitioners,

vs.

WYNNE COOPER, M.D.,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Pennsylvania

BRIEF IN OPPOSITION FOR RESPONDENTS WESTERN PENNSYLVANIA HOSPITAL AND NEAL B. SIMMONS, M.D.

OPINIONS AND JUDGMENT BELOW

Respondent accepts the citations to the opinions and judgment of the lower courts as stated in the Petition for Writ of Certiorari.

STATEMENT OF JURISDICTION

The United States Supreme Court has discretion to exercise jurisdiction over this case pursuant to Rule 10.1 of the Rules of the Supreme Court of the United States and 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Respondent accepts the verbatim recitation of constitutional provisions and statutes involved in the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

Petitioner Taneika James, is the mother and natural guardian of Louis Edmonds, a minor child. Petitioner has alleged that Taneika James was a patient of Wynne Cooper, M.D. for obstetrical care. They further allege that Dr. Cooper referred the patient for a sonogram which was performed and interpreted by Neal B. Simmons, M.D., Harvey L. Neiman, M.D. and Radiology Associates of Western Pennsylvania, C.P. at the Western Pennsylvania Hospital.

It is alleged that the sonogram revealed a defect in the brain of the fetus known as a porencephalic cyst. It is alleged that on October 25, 1988, the date of the sonogram, the fetus had a gestational age of 25.3 weeks with a range of 23.5 to 26.9 weeks.

The Petitioner further alleges that the results of the sonogram

were not communicated to the Petitioner by any of the Respondents/Defendants due to their collective and individual negligence. The Petitioner alleges that had she been promptly advised of the results of her sonogram, she would have aborted the child. Petitioner alleges that her son was born on February 12, 1989, and was diagnosed with quadrigeminal arachnoid cysts in addition to hydrocephalus. It is alleged that these conditions will require medical attention in the future.

The Petitioners filed two separate lawsuits in the Court of Common Pleas of Allegheny County alleging medical negligence and seeking damages for wrongful birth. The first suit was filed in 1989 against Wynne Cooper, M.D., the obstetrician of the mother, alleging negligence for failing to communicate the results of the sonogram performed on the mother. The second suit was brought by the same Petitioners against the Western Pennsylvania Hospital, Radiology Associates of Western Pennsylvania, P.C., Neal B. Simmons, M.D. and Harvey L. Neiman, M.D. again, alleging negligence and seeking damages for failing to communicate the results of the sonogram.

The Respondents/Defendants filed Preliminary Objections in the Nature of a Demurrer relying on 42 Pa. C.S.A. § 8305 which bars claims seeking recovery for wrongful birth. An order and opinion of the Honorable J. McLean sustained the Preliminary Objections. Dr. Cooper in the parallel suit filed a Notion for Judgment on the Pleadings raising the same defense and judgment was granted on her behalf and an opinion was entered by the Honorable David S. Cercone.

The Superior Court of Pennsylvania affirmed both orders and opinions by a published opinion dated April 30, 1992. *Edmonds v. Western Pennsylvania Hospital*, 414 Pa. Super. 567, 607 A.2d 1083 (1992). Both opinions found that the Pennsylvania statute did not constitute a deprivation or an interference with a woman's right to an abortion.

The Supreme Court of Pennsylvania denied *Allocator* on January 6, 1993.

SUMMARY OF ARGUMENT

The Supreme Court of Pennsylvania properly denied review of the Superior Court of Pennsylvania's opinion upholding the constitutionality of Pennsylvania's Wrongful Birth Statute, 42 Pa. C.S.A. § 8305.

The Petitioner asserts that review is proper based on the category of certiorari considerations contained in Rule 10.1(a) of the Rules of the Supreme Court of the United States. However, this matter does not present a decisional conflict among federal court of appeals as required by that rule. The Petitioner's attempt to obtain review by this Court based on alleged discrepancies between the Seventh and Eleventh Circuits fails. There is no conflict with either of these decisions and the decision below.

The Superior Court has rendered two subsequent opinions that the law in question is a valid legislative enactment and does not interfere with a woman's right to an abortion. These decisions recognize the Pennsylvania statute as constitutional under the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the United States Constitution.

This is an action alleging medical negligence against the Respondents/Defendants. Petitioner's claim that the Pennsylvania statute violates the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment is without merit. The Wrongful Birth Statute does not implicate "state action" which is a prerequisite to claiming a constitutional deprivation. However, assuming there is state action, then the Legislature of Pennsylvania had a rational basis for enacting the statute which does not unduly interfere with a woman' s ability to select an abortion.

For the reasons which follow, Respondents/Defendants request the Petition for Writ of Certiorari be denied.

REASONS FOR DENYING THE WRIT

I.

THERE EXISTS NO STATED CONFLICT BETWEEN THE DECISION BELOW AND THE SEVENTH AND ELEVENTH CIRCUIT DECISIONS CITED BY PETITIONER ON THE CONSTITUTIONALITY OF PENNSYLVANIA'S WRONGFUL BIRTH STATUTE.

Rule 10.1(a) of the Rules of the Supreme Court of the United States limits certiorari in "conflicting decision situations to those where a ". . . United States Court of Appeals has rendered a decision in conflict with the decision of *another* United States Court of Appeals on the same matter. . . ." (Emphasis added.)

In an attempt to secure certiorari order Rule 10.1(a), Petitioner asserts that a "conflict" exists between Seventh and Eleventh Circuit decisions. Petitioner specifically argues that *Robak v. United States of America*, 6587 F.2d 471 (7th Cir. 1981) and *Campbell v. United States*, 962 F.2d 1579 (11th Cir. 1992) *cert. denied*, 113 S. Ct. 1254 (Feb. 22, 1993) are "hard to reconcile" with each other (Petition for Writ of Certiorari, page 11).

Although Petitioner asserts that the Seventh Circuit's decision in *Robak* and the Eleventh Circuit's decision in *Campbell* are "hard to reconcile," she fails to point out any conflict between either of these decisions and the decision below. Rule 10.1(a) addresses conflicts among court of appeals decisions. However, the decision below is from the highest state court of Pennsylvania.

If review is proper at all, it could only be premised under a

Rule 10.1(b) or (c) conflict. Here the Petitioner has not pointed out any inconsistency between a court of appeals decision and the decision below. Rather, the Petitioner asks this court to find a conflict to exist based on alleged discrepancies between two circuit decisions without regard to the decision below.

Assuming, *arguendo,* the Petitioner had relied on a Rule 10.1(b) conflict between a decision rendered by the highest state court and a court of appeals, certiorari should still be denied. The decision below is consistent with the Eleventh Circuit's findings in *Campbell.* The court of appeals decided that refusal to allow a cause of action for wrongful birth did not amount to state action and was not in violation of The Due Process or Equal Protection Clauses under the Fourteenth Amendment. The Supreme Court of the United States refused to take that case upon Petition for Writ of Certiorari.

Equally, the decision below is not inconsistent with *Robak.* The Seventh Circuit held that under Alabama law there existed a cause of action for wrongful birth. That court did *not* have the opportunity to address the constitutionality of a statute barring a cause of action for wrongful birth. The Seventh Circuit simply decided that such a cause of action existed under Alabama law while the decision below dealt with the constitutionality of a state statute barring a cause of action for wrongful birth.[1] Therefore, *Robak* and the decision below are not in conflict.

Assuming, *arguendo,* the Petitioner had relied on Rule 10.1(c) of the Rules of the United States Supreme Court, which provides for certiorari consideration, "When a state court . . . has decided an

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1. In Pennsylvania, after the decision in *Speck v. Finegold,* 497 Pa. 77, 439 A.2d 110 (1981), the legislature by statute barred such causes of action for wrongful birth. *(See also,* Opinion of Cercone, J. (Petitioner's Brief, Appendix E p. 24a.)) In *Robak,* there was no legislative enactment.

important question of federal law which has not been, but should be settled by this court, or has decided a federal question in a way that conflicts with applicable decisions of this court," the Petition should still be denied. As discussed extensively by Respondent in subsection (c) of this Brief, Petitioner's claim is not about a woman's constitutionally protected right to an abortion. This case is a negligence claim seeking damages for alleged medical malpractice. The Petitioner attempts to hold the Respondents/ Defendants responsible for genetic problems they did not cause. The Pennsylvania Legislature has rationally chosen to bar such causes of action. Therefore, the Petition does not involve a constitutional question for this Court to review.

The Petitioner has not asserted a proper "conflict" between circuit decisions under Rule 10.1(a), because the decision rendered below is one from the highest state court. Moreover, the Petitioner has not identified any conflict in the decision rendered below and ". . . the decision . . . of a United States Court of Appeals." Rule 10.1(b), Rules of the Supreme Court of the United States. The Petitioner has presented no important question of constitutional law or decision that conflicts with those of the United States Supreme Court under Rule 10.1(c). Accordingly, the Petition for Writ of Certiorari should be denied.

II.

DECISION BELOW WAS FOLLOWED BY TWO SUBSEQUENT PENNSYLVANIA SUPERIOR COURT DECISIONS.

The Superior Court of Pennsylvania followed the decision below *(Edmonds v. Western Pennsylvania Hospital,* 414 Pa. Super. 567, 607 A.2d 1083 (1992)) on two subsequent occasions.

In *Dansby v. Thomas Jefferson University Hospital,* 1993 WL

78740 (Pa. Super. 1993), the court citing *Edmonds* as a "similar constitutional challenge" stated that the wrongful birth statute did not burden a woman's right to an abortion or exercise of that right. *Id.* at 2-3.

The Superior Court in *Bianchini v. N.K.D.S. Associates Ltd.*, 616 A.2d 700 (Pa. Super. 1992) held that *Edmonds* controlled the constitutional challenge to Pennsylvania's wrongful birth statute. *Id.* at 703, n.7.

III.

PENNSYLVANIA'S WRONGFUL BIRTH STATUTE IS CONSTITUTIONAL UNDER THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE UNITED STATES CONSTITUTION.

The Petitioners contend that the legislative enactment barring claims for wrongful birth violates the Constitution of the United States because it interferes with a woman's right to an abortion.

The Superior Court of Pennsylvania, Judges McLean and Cercone and the Respondents all assert that the law in question is a valid legislative enactment and does not interfere with a woman's right to an abortion. The Supreme Court of Pennsylvania denied *Allocatur.*

The Superior Court of Pennsylvania correctly noted that legislative enactments enjoy a strong presumption of constitutionality. *Dranzo v. Winterhalter,* 395 Pa. Super. 578, 577 A.2d 1349 (1990). In addition, all doubts relating to the constitutionality of legislative enactments must be resolved in the law's favor. *Dansby,* 1993 WL 78740 (Pa. Super.) at 1, *citing Edmonds,* 414 Pa. Super. at 574, 607 A.2d at 1087.

The Petitioners have alleged that the Due Process and Equal Protection Clauses of the Fourteenth Amendment have been violated by the Pennsylvania statute. A prerequisite for finding a violation of the Fourteenth Amendment is a showing by the moving party that there is state action. *Shelley v. Kramer,* 334 U.S. 1, 68 S. Ct. 836, 92 L. Ed. 1161 (1948). In this case, only private conduct is at issue. The hospital, the doctors and the professional group are all independent private actors not operating under the color of state law.

The Supreme Court of Minnesota in an extremely similar case found that a Minnesota law barring claims for wrongful birth did not involve state action. The Minnesota Supreme Court held:

> The relationship here is strictly between doctor and patient. The statute does not forbid the doctor to inform the patient of new tests and the risks they entail. It does not directly touch on the expectant mother's right to choose an abortion. Due process does not require that the state adopt regulations prohibiting purely private conduct.

Hickman v. Group Health Plan, Inc., 396 N.W. 2d 10, 13 (1986), *citing Bloom v. Yaretsky,* 457 U.S. 991, 102 S. Ct. 2777, 73 L. Ed. 2d 534 (1982).

Pennsylvania's wrongful birth statute does not interfere with the right of the Petitioner to choose an abortion. The law in question prevents a claim for damages and suit against the doctor for damages. The law does not regulate, interfere with, or otherwise dictate when a doctor or patient may discuss abortion as an option or when a mother may choose abortion as an option.

The decision of *Roe v. Wade,* 410 U.S. 113, 93 S. Ct. 705, 35 L.

Ed. 2d 147 (1973) created a right for a woman to choose an abortion under certain circumstances. However, *Roe* did not declare an unqualified constitutional right to an abortion. Rather, a woman may select an abortion without unduly burdensome interference by the state. *Maher v. Roe*, 432 U.S. 464, 97 S. Ct. 2376, 2382, 53 L. Ed. 2d 484 (1977). The Supreme Court has repeatedly held that a state may make value judgments favoring childbirth over abortion. *Rust v. Sullivan*, 111 S. Ct. 1759, 114 L. Ed. 2d 233 (1991). Furthermore, *Roe v. Wade* "implies no limitation on the authority of the state to make value judgments favoring childbirth over abortion." *Webster v. Reproductive Health Services*, 492 U.S. 490, 109 S. Ct. 3040, 106 L. Ed. 2d 410 (1989). Here, there is no interference by the state with a doctor and patient to discuss an abortion. The court of appeals in *Campbell* stated:

> Georgia has not commanded doctors to interfere with a woman's constitutional rights. Georgia's reluctance to interject itself into the private relations of its citizens cannot be construed as affirming or encouraging private conduct for purposes of the Fourteenth Amendment. To find state action whenever a state has not acted would broaden state action to encompass practically all private conduct.

Campbell, 962 F.2d at 1583. Pennsylvania's law is markedly different from the holding of the United States Supreme Court in *Rust* where the court upheld regulations which prohibited a doctor from discussing abortions with patients at federally funded clinics. Here, the law in no way prevents or prohibits a doctor from discussing abortions with a patient.

The United States Supreme Court has also held that there must be a direct impact on a woman's abortion right or a significant burden placed on an abortion right before the law in question will

be held invalid. *See Maher,* 97 S. Ct. 2376 and *Planned Parenthood Association v. Ashcroft,* 462 U.S. 476, 103 S. Ct. 2517, 76 L. Ed. 2d 733 (1983). In other words, a government may not place obstacles in the path of a woman's exercise of her freedom of choice, but by the same token, government need not remove those obstacles which are not of its own creation. *Hickman,* 396 N.W. 2d at 17, citing *Harris v. McRae,* 448 U.S. 297, 100 S. Ct. 2671, 65 L. Ed. 2d 784 (1980). As the Pennsylvania Superior Court recently noted in *Dansby,* quoting *Speck:*

> The "refusal to create new tort liability does not constitute governmental interference with the constitutionally protected access to abortion. The right to seek an abortion is neither predicated upon the existence of a negligence cause of action, nor is it deterred by the absence of such a cause of action."

Speck, 497 Pa. at 97, 439 A.2d at 120-121 (Opinion by Nix, J.) *cited* in *Dansby,* 1993 WL 78740 (Pa. Super.) at 3.

Here there is no state action, and the law in question does not interfere with or unduly burden a woman s right to an abortion. The law in question prevents a claim for damages in a suit against a doctor for damages. The law does not regulate, interfere with or otherwise dictate when a doctor and a patient may decide about abortion as an option. Therefore, there is no infringement of the rights announced in *Roe v. Wade.*

However, assuming there is state action, then the Legislature of Pennsylvania had a rational basis for enacting the Wrongful Birth Statute. Pennsylvania is permitted to make a value judgment favoring childbirth over abortion. *Rust,* 111 S. Ct. at 1772. The Supreme Court of the United States has held that there is no need for a state to show a compelling state interest each time it makes a

value judgment favoring childbirth over abortion. *Maher,* 97 S. Ct. at 2384. The Supreme Court in *Maher* held specifically:

> We think it is abundantly clear that a state is not required to show a *compelling interest* for its policy choice to favor normal childbirth anymore than a state must so justify its election to fund public but not private education.

Id. (emphasis added). The Supreme Court held that the rational basis test applied because the law in question did not impinge on the right to select an abortion. *Id.* at 2385, *citing Lindsey v. Normet,* 405 U.S. 56, 92 S. Ct. 862, 31 L. Ed. 2d 36 (1972); *Massachusetts Board of Retirement v. Murgia,* 427 U.S. 307, 96 S. Ct. 2562, 49 L. Ed. 2d 520 (1976). Here there is no impingement on the petitioner-mother's right to select an abortion. Therefore, the law need only have a rational basis.

Perhaps the most succinct and eloquent defense of the law regarding its rational basis is set forth in Judge Cercone's Opinion. The Judge wrote as follows:

> We believe that our legislature unquestionably had a rational basis for enacting section 8305. Senator Rocks provided the following viewpoint during debate on this legislation:
>
> > This is the intent of what the wrongful birth and wrongful life legislation is about[:] To stop a court and gender policy which views the birth of a child, be that child handicapped or otherwise, as a damaging event for which someone should be punished in order to prevent this quality of life ethic from becoming

> so pervasive that a handicapped child is routinely considered better off dead and of less value than what we would call a "normal child" and to prevent the practice of medicine especially obstetrics and gynecology, from becoming coerced into accepting eugenic abortion as a condition for avoiding what are particularly wrongful birth lawsuits.
>
> Pa. Senate Leg. 1961 (March 22, 1988).

Other proffered rational for this statute are also persuasive. The legislature believed that it would be improper to view any birth as an evil or wrong, and thus a cause of action. Secondly, our society has become increasingly aware and protective of the rights of the handicapped. To recognize the validity of a wrongful life statute would be to make the handicapped a lower class of citizen. Third, the recognition of these types of actions by the legislature would, in essence, have dictated to the medical profession how to practice in the area of obstetrics. Finally, a recognition of these causes of action would have caused ever increasing malpractice insurance rates to increase exponentially, where the resulting loss of adequate medical care in this vital area. *See* Pa. House Leg. 2306 (February 24, 1988).

We believe that Section 8305 has a rational basis designed to meet a legitimate state interest. The legislature has not opted to make

> physicians exempt for their wrongdoings. Rather the legislature has validly freed physicians from liability from defects or handicaps for which the physician is in no way responsible.

(Petitioner's Brief, Appendix E, p. 26a).

As was noted previously, at the core of a wrongful birth cause of action is the idea that persons born disabled have suffered a legal injustice in that non-existence is preferable to an existence with disabilities. "The idea that a handicapped child would lead a life that should better never have been lived, or that the parents are damaged by that child's presence in their family, bespeaks . . . a pervasive social prejudice against a handicap . . ." *Valentine, When the Life Calls Life Wrong,* 8 Hum. Life Rev. 46, 52 (Summer 1982). If we assume that a wrongful birth cause of action is based upon an irrational prejudice against disabled persons, then that cause of action in itself would be unconstitutional. *Bopp, Bostrom & McKinney, The Rights and Wrongs of Wrongful Birth and Wrongful Life: A Juris Prudential Analysis of Birth Related Torts,* 27 Duq. L. Rev. 461 (Spring, 1989), *citing City of Cleburne, Texas v. Cleburne Living Center, Inc.,* 473 U.S. 432, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985) (The court struck down a restrictive zoning ordinance based on an irrational prejudice against the mentally retarded). Allowing a cause of action for wrongful birth also contradicts many state policies designed to provide assistance to disabled persons. The contradiction arises where a state permits a wrongful birth claim that in essence encourages the destruction of disabled fetuses while at the same time the state seeks to protect those lives after birth. *Rosenblum & Grant, The Legal Response to Baby Doe: An Analytical Prognosis,* 1 Issues in L. & Med. 391 (1986).

If wrongful birth causes of action are permitted in Pennsylvania, this will also place an increasing burden on

physicians to determine what information is important to parents when attempting to obtain the parent s consent for the fetus to be carried to term. *Azzolino v. Dingfelder,* 315 N.C. 103, 337 S.E. 2d 528 (1985). As medical science advances, increasing physicians' capabilities of detecting genetic imperfections, then this increased knowledge will inevitably place physicians in a dilemma of whether or not to take the safe course of action which would be to recommend an abortion. *Id.*

As part of Petitioner's equal protection claim, they argue that Pennsylvania permits a cause of action for wrongful conception based upon negligence in connection with a failed sterilization, but denies a cause of action based upon negligence which interferes with the woman's right to an abortion. Presently, Pennsylvania permits a cause of action for wrongful conception. *Speck v. Finegold,* 497 Pa. 77, 439 A.2d 110 (1981). In enacting 42 Pa. C.S.A. § 8305, the legislature of Pennsylvania did not intend to extinguish a cause of action for wrongful conception. In response to a statement by Senator Lewis during debate on the wrongful birth legislation, Senator Rocks stated:

> For what the gentleman from Bucks, Senator Lewis, has called his second level of concern, the physician described with the so-called botched or fully negligent sterilization, nothing in this legislation would prevent an action fully calling into account the negligence of that physician. In fact, the suit would be on the grounds of wrongful conception. It could be brought today and should be brought tomorrow. Nothing in the legislation in front of us deals with that. In that hypothetical situation, while I would hope it would not happen, the physician would be fully liable to the fullest extent of the court's decision for

> both his or her negligence and the financial damages involved.

19 Leg. Journal P. 1963 (March 22, 1988).

Allowing a cause of action for wrongful conception and disallowing one for wrongful birth, does not violate the Equal Protection clause. In *Dansby,* the Superior Court of Pennsylvania held that Pennsylvania's Wrongful Birth Statute had a rational basis. The Court stated that with an equal protection claim, "When the group affected is not a suspect class and the right infringed is not deemed fundamental, the challenged statute must be sustained if it bears a rational relationship to a legitimate state interest." *Dansby,* 1993 W.L. 78749 at 3. The Minnesota Supreme Court in *Hickman,* pointed out that the differences between wrongful conception causes of action and wrongful birth causes of action establish a rational basis for the legislature's action:

> In both cases, the Plaintiff would not have had the child, but for the negligence of the doctor, but the interest sought to be compensated are different. In one case, there is the right not to conceive; and the other, there is the right not to give birth. In the one, it is the right not to have an unplanned child, while in the other, it is the right not to have an unwanted child. In the one case, there is no hypothetical exercise of choice of treatment, while in the other case there is.

Hickman, 396 N.W. 2d at 17 (concurring Opinion of Justice Simonett).

The Pennsylvania Legislature had several rational bases for enacting a Wrongful Birth Statute. The United States Supreme Court has held that a state may make value judgments which favor

childbirth over abortion, so long as that judgment is not made at the expense of a woman's right to an abortion. Pennsylvania's Wrongful Birth Statute does not infringe upon a woman's right to an abortion. As Judge Cercone noted, the refusal to recognize a cause of action for wrongful birth does not interfere with the constitutionality protected right to choose an abortion (Petitioner's Brief, Appendix E, p. 26a).

IV.

REVIEW OF THE DECISION BELOW WOULD TURN SOLELY UPON AN ANALYSIS OF A STATE TORT LAW CLAIM.

Plaintiffs who allege a wrongful birth cause of action, must meet the traditional requirements of a negligence actions, which include the existence of a duty, a breach of that duty, and a showing that the breach was the proximate cause of the Plaintiffs' injuries and damages. If we assume that doctor owes a duty to a patient to conduct genetic tests and to apprise the patient of those results and that this duty has been breached, the requirement of showing that the breach was the proximate cause of the Plaintiff's injury would require a quantum leap. A patient in a position such as Taneika James, must admit that her fetus, which was in existence at the time of the alleged breach of duty was not the result of any breach of duty. *Azzolino,* 337 S.E. 2d at 553. As the court in *Dansby* noted:

> The legislature, by statute, has freed physicians from liability for birth defects or handicaps for which the physician was not responsible. The physician's alleged negligence in failing to perform carefully an amniocentesis test cannot be said to be the proximate cause of the child's handicapped wife. In this case, the child's disorders existed from the time of conception

> and were not the result of any negligence on the part of Mrs. Dansby's positions.

Dansby, 1993 W.L. 78749 at 3. Taking this a step further, even if we assume that the birth of a disabled child was the proximate result of the Defendant's negligence, traditional tort analysis breaks down, because in order to permit a recovery, a court must hold that the existence of human life constitutes an injury. *Azzolino,* 337 S.E. 2d at 533-34.

Under traditional tort law, it is a fundamental principle for damages to restore an injured party at near as possible to the position he or she occupied prior to the commission of a wrong by another party. *Bopp Bostrom & McKinney, The Rights and Wrongs and Wrongful Birth and Wrongful Life: A Jurisprudential Analysis of Birth Related Torts,* 19 Duq. L. Rev. 461, 503 (Spring, 1989) citing *United States v. Hatahley,* 257 F.2d 920 (10th Cir. 1958) (other citations omitted). Therefore, in theory, a parent who brings a wrongful birth cause of action seeks to recover for the birth of a living child which could have been avoided by an abortion. *Id.* at 503-504. Under this situation, the most effective and inexpensive remedy would be to end the child's life. *Id.* Obviously, this is not a viable remedy, but it points out why wrongfully birth causes of action do not fit within traditional concepts of tort recovery. There is also a problem with mitigation of damages under a wrongful birth cause of action. Traditional tort concepts require a plaintiff to mitigate damages. *Azzolino,* 337 S.E. 2d at 534. Justice Mitchell writing for the Supreme Court of North Carolina discussed one of the problems confronting courts concerning the extent to which a Plaintiff must mitigate damages:

> They have for example, been unable to reach anything resembling a consensus as to whether damages in wrongful birth cases should be reduced or offset by any emotional or other

> benefits accruing to the parent by reason of the life, live and affection of the defective child. (Citation omitted.) Likewise, they have been unable to reach any consensus on the issue of whether there is a duty on the part of the parents to place the child for adoption in order to reduce their damages...
>
> Perhaps the uncertainty and lack of uniformity among courts concerning both the proper measure of damages and the duty to mitigate damages in wrongful birth cases, arises at least in part from a failure to recognize that the "injury" for which they seek to compensate the Plaintiffs is the existence of a human life. As a result: Although courts and commentators have attempted to make it such, wrongful birth is not an ordinary tort. It is one thing to compensate destruction; it is quite another to compensate creation. This so-called wrong is unique. It is a new and ongoing condition. As life, it necessarily interacts with other lives. Indeed, it drives its injurious nature from the predilection of the other lives it touches. It is naive to suggest that such a situation falls neatly into conventional tort principles, producing neatly calculable damages. (Citation omitted).

Azzolino, 537 S.E. 2d at 534-535.

From the foregoing discussion, it is easy to see why the legislature has banned the cause of action for wrongful birth.

The Superior Court of Pennsylvania in an excellent analysis found that the language of the law did not compel the conclusion

that the law encouraged medical providers to infringe upon the abortion rights of their patients. The Court stated:

> If a physician intentionally misrepresented to a woman the state of her health or that of her fetus in an effort to infringe upon her abortion rights, he could be disciplined by the appropriate licensing authority. Since 42 Pa. C.S.A. § 8305(a) specifically indicates that it provides no defense to a disciplinary proceeding involving such misrepresentations, it clearly does not encourage physicians to make them.

Edmonds, 607 A.2d at 1087 (Petitioner's Brief, Appendix D, p. 15a). A physician who did that would be subject to certain disciplinary review procedures found in the Osteopathic Medical Practices Act and Medical Practice Act. 63 P.S. § 27.1, *et seq.* and 63 P.S. § 422.1, *et seq.* Similarly, the Eleventh Circuit in *Campbell* stated, "A doctor who negligently failed to provide this information to a pregnant woman runs the risk of having Georgia's Board of Medical Examiners determine that the doctor s deficient performance merits suspension or revocation of the doctor's medical license." *Campbell*, 962 F.2d at 1586-1587. Moreover, the law is silent as to whether it encourages a physician to engage in negligent conduct. Therefore, the Superior Court of Pennsylvania felt that the presumption of constitutional legitimacy would prevent it from finding a law to be unconstitutional. *Edmonds*, 607 A.2d at 1088 (Petitioner's Brief, Appendix D, p. 16a). Perhaps most compelling is the unrefuted fact that the law does not prevent or interfere with the woman's right to an abortion.

CONCLUSION

For the foregoing reasons, Respondent, Western Pennsylvania Hospital, respectfully requests that the Petition for Writ of Certiorari be denied because the criteria contained in Rule 10.1 of the Rules of the United States Supreme Court are not met. Additionally, the law in question does not constitute state action, does not interfere with or burden a woman's right to select an abortion, is a valid rationale exercise of the legislative function and does not violate the Constitution of the United States.

Respectfully submitted,

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No. 92-1819

IN THE

Supreme Court of the United States

October Term, 1992

LOUIS EDMONDS, a minor by TANEIKA JAMES, mother and natural guardian, and TANEIKA JAMES, in her own right,

Petitioners,

vs.

THE WESTERN PENNSYLVANIA HOSPITAL, RADIOLOGY ASSOCIATES OF WESTERN PENNSYLVANIA, P.C., NEAL B. SIMMONS, M.D. and HARVEY L. NEIMAN, M.D.,

Respondents.

—0—

LOUIS EDMONDS, a minor by TANEIKA JAMES, mother and natural guardian, and TANEIKA JAMES, in her own right,

Petitioners,

vs.

WYNNE COOPER, M.D.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA

BRIEF OF RESPONDENT WYNNE COOPER, M.D., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

October Term, 1992

No. 92-1819

LOUIS EDMONDS, a minor by TANEIKA JAMES, mother and natural guardian, and TANEIKA JAMES, in her own right,

Petitioners,

vs.

THE WESTERN PENNSYLVANIA HOSPITAL, RADIOLOGY ASSOCIATES OF WESTERN PENNSYLVANIA, P.C., NEAL B. SIMMONS, M.D. and HARVEY L. NEIMAN, M.D.,

Respondents.

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LOUIS EDMONDS, a minor by TANEIKA JAMES, mother and natural guardian, and TANEIKA JAMES, in her own right,

Petitioners,

vs.

WYNNE COOPER, M.D.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA

BRIEF OF RESPONDENT WYNNE COOPER, M.D., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

COUNTERSTATEMENT OF THE CASE

Petitioners in the instant action are a mother and her natural child who together brought two separate lawsuits alleging negligence and seeking damages for wrongful brith in the Court of Common Pleas of Allegheny County, Pennsylvania. The first suit was filed in 1989 against Wynne Cooper, M.D., the obstetrician of the mother, alleging negligence for failing to communicate the results of a sonogram performed on the mother. See Respondent's Appendix (hereinafter cited as "RA"). The second suit was brought by petitioners against The Western Pennsylvania Hospital, Radiology Associates of Western Pennsylvania, P.C., Neil B. Simmons, M.D., and Harvey L. Neiman, M.D. again alleging negligence in seeking damages for failing to communicate results of a sonogram.

Petitioner Taneika James (hereinafter "Ms. James") alleged that on or about June 8, 1988, she first learned she was pregnant. (RA2). On or about October 10, 1988, Ms. James was examined by Dr. Cooper. (RA3). Ms. James alleged that the sonogram revealed fetal abnormalities. (RA3). That sonogram estimated the gestation age of the unborn child was 25.3 weeks with a range of 23.5 to 26.9 weeks. (RA3). On or about December 12, 1988, Ms. James was again examined by Dr. Cooper and a second sonogram was scheduled and thereafter performed on December 27, 1988. Ms. James alleged the second sonogram confirmed the fetal abnormality. (RA4). On or about December 29, 1988, Dr. Cooper referred Ms. James to a genetic clinic. (RA4). Ms. James alleged that on February 12, 1989, she delivered her son, Louis Edmonds, by Caesarean section. Ms. James further alleged that subsequent to her son's birth, it was confirmed that he suffered from quadrigeminal arachnoid cysts and hydrocephalus. (RA5).

In her suit against Dr. Cooper, Ms. James alleged both wrongful birth and wrongful life causes of action. Ms. James alleged that Dr. Cooper was negligent in not informing her of the child's potential injury in a timely manner, thus precluding her from terminating the pregnancy. Ms. James also asserted, on behalf of her son, Louis Edmonds, a claim for wrongful birth. Dr. Cooper moved for Judgment on the Pleadings on the basis that Pennsylvania has statutorily prohibited causes of action for both wrongful birth and wrongful life. 42 Pa.C.S.A. §8305.

At argument upon the Motion for Judgment on the Pleadings, Ms. James did not contest the propriety of an Order granting Judgment on the Pleadings as to the wrongful life cause of action. Additionally, Ms. James agreed that as to the wrongful birth claim, Section 8305 was applicable to bar the claim, arguing instead that Section 8305 was unconstitutional.

Ms. James appealed the granting of Dr. Cooper's Motion for Judgment on the Pleadings to the Superior Court of Pennsylvania. Ms. James also appealed an Order granting a demurrer to the Complaint filed by the other Respondents in this action. On March 13, 1991, all parties filed a stipulation to consolidate the appeals. The Superior Court of Pennsylvania, on or about April 30, 1992, affirmed the Orders of the lower court in the instant action and dismissed Petitioners' Complaint pursuant to 42 Pa.C.S.A. §8305(a). Petitioner filed a Petition for Allowance of Appeal with the Supreme Court of Pennsylvania on or about June 1, 1992. This Petition was denied by the Supreme Court of Pennsylvania, *per curiam*, on January 6, 1993. Petitioners then filed an application for reargument with the Supreme Court of Pennsylvania which was also denied, *per curiam*, on February 12, 1993. Petitioners then filed a Petition for a Writ of Certiorari with this Honorable Court.

REASONS FOR DENYING THE WRIT

Rule 10 of the Rules of the Supreme Court of the United States provides that: "[a] review on Writ of Certiorari is not a matter of right, but of judicial discretion. A petition for a Writ of Certiorari will be granted only when there are special and important reasons therefor." In the case *sub judice,* the Pennsylvania Supreme Court's decision, which affirmed that of the Superior Court of Pennsylvania, is clearly correct and in accordance with applicable decisions of this Court and of Federal Appellate Courts. Consequently, there are no special or important reasons for this Court to review the issues decided by the Courts below, and the grounds asserted by petitioners for the exercise of this Court's discretion are wholly without foundation or merit. A review of the arguments raised by petitioners, and a presentation of the reasons for the denial of the Writ, are presented separately for each issue below.

I. Pennsylvania's wrongful birth statute set forth in 42 Pa.C.S.A. §8305(a) does not deprive a woman of her constitutional rights to due process and equal protection under the 14th Amendment of the United States Constitution.

In *Roe v. Wade,* 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed. 2d 147 (1973), this court held that a woman has a constitutionally protected right to choose whether or not to have an abortion in the first trimester of pregnancy. In order to be in violation of *Roe v. Wade,* a state must directly affect or impose a significant burden on a woman's right to an abortion. See *Maher v. Roe,* 432 U.S. 464, 97 S.Ct. 2376, 53 L.Ed. 2d 484 (1977).

In the instant case, petitioner Taneika James alleges that she would have chosen to have an abortion during the first trimester of her pregnancy if she had been informed of fetal abnormalities in a timely manner by respondents (doctors, a hospital and a professional corporation). Ms. James believes, therefore, that she should be permitted to bring an action against respondents seeking damages for the wrongful birth of her child. Pennsylvania's Wrongful Birth Statute at 42 Pa.C.S.A. §8305(a) prohibits actions for wrongful birth. Ms. James argues that this statute infringes upon her right to choose under *Roe v. Wade,* and therefore violates her due process and equal protection rights under the 14th Amendment.

To assert a violation of due process or equal protection under the constitution, a party must prove state action. *Shelly v. Kraemer,* 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161 (1948). Legislation which does not place a *government* obstacle in the path of a woman who chooses to terminate her pregnancy will not be deemed unconstitutional. *Harris v. McRae,* 448 U.S. 297, 315, 100 S.Ct. 2671, 2687, 65 L.Ed. 2d 784, 803 (1980).

In the present case the allegations of negligence of failing to timely communicate the results of the sonogram, thus allegedly preventing the mother from having an abortion are directed towards private individuals. Therefore, assuming *arguendo* that the allegations are correct, then the respondent doctors and respondent hospital, and not the state placed an alleged obstacle. If anyone arguably infringed on Ms. James' right to an abortion, it was the doctors and the hospital and not the state. "[A]lthough government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its

own creation." *Harris,* 448 U.S. at 316, 100 S.Ct. 2688, 65 L.Ed. 2d at 804. The state, therefore, has no obligation to remove such obstacle. *Id. See also Webster v. Reproductive Health Service,* 492 U.S. 490, 509, 109 S.Ct. 3040, 3052, 106 L.Ed. 2d 410, 430 (1989); *Maher,* 432 U.S. at 474.

Furthermore, as the Pennsylvania Superior Court acknowledged in the instant action, although the provisions of 42 Pa.C.S.A. §8305(a) clearly relieve physicians from liability for negligently failing to provide women with information affecting abortion decisions, it would be speculative to assume that such extinguishment of liability encourages improper behavior. (See Opinion of the Pennsylvania Superior Court dated April 30, 1992 and attached to Petitioners' Brief as Appendix D, p. 16a). *See also, Dansby v. Thomas Jefferson University Hospital,* 1993 W.L. 78740 (Pa. Super. 1993); *Edmonds v. Western Pennsylvania Hospital Radiology Associates,* 414 Pa. Super. 567, 607 A.2d 1083 (1992).

The Osteopathic Medical Practice Act, 63 P.S. §271.1 *et seq.,* and the Medical Practice Act of 1985, 63 P.S. §422.1 *et seq.,* respectively create the State Board of Osteopathic Medicine and the State Board of Medicine. In addition, they establish licensing procedures for various medical professionals, including physicians, and provide that licenses may be refused, revoked or suspended for certain enumerating reasons. *Edmonds,* 607 A.2d at 1087. According to the two acts, physicians may be disciplined by the appropriate boards for making intentional misrepresentations in connection with patient care. *See* 63 P.S. §§271.15(a)(2) and 422.41(2). Thus, if a physician intentionally misrepresented to a woman the

state of her health or that of her fetus in an effort to infringe upon her abortion rights, he could be disciplined by the appropriate licensing authority. *Id.*

Since 42 Pa.C.S.A. §8305(a) specifically indicates that it provides no defense to a disciplinary proceeding involving such misrepresentations, it clearly does not encourage physicians to make them. *Edmonds,* 607 A.2d at 1087. Nor can it be presumed that the act in any way encourages negligent behavior. All doubts relating to the constitutionality of a statutory provision must be resolved in its favor. *Id.* It must be presumed, therefore, that 42 Pa.C.S.A. §8305(a) does not encourage physicians to engage in the negligent conduct at issue. *Id.*

In *Hickman v. Group Health Plan, Inc.,* 396 N.W. 2d 10 (1986), Appellants like Ms. James in the instant case, argued that the State's failure to provide a remedy for money damages against a negligent doctor is an intrusion upon a woman's constitutional rights. *Hickman,* 396 N.W. 2d at 16. Minnesota has a wrongful birth statute substantially similar to 42 Pa.C.S.A. §8305(a). *Id.* at 12. In *Hickman,* the Plaintiffs brought suit alleging *inter alia,* that had they known that their minor child had downs syndrome prior to her birth, they would have chosen to have an abortion. *Hickman,* 396 N.W. 2d at 16. Defendants brought a motion for summary judgment on the basis of the Minnesota Wrongful Birth Statute. The District Court initially found the Minnesota statute unconstitutional under *Roe v. Wade, supra,* but the Supreme Court of Minnesota preserved the statute and upheld its constitutionality. In reaching their decision, the Minnesota Supreme Court held that the statute did not violate the due process and equal protection clauses of the 14th Amendment because there was no state action or state involvement. The Court stated:

> The relationship here is strictly between the doctor and patient. The statute does not forbid the doctor to inform the patient of new tests and risks they entail. It does not directly touch on the expectant mother's right to choose an abortion. Due process does not require that the state adopt regulations prohibiting purely private conduct.

Id. at 13, citing *Blum v. Yaretsky*, 457 U.S. 991, 102 S.Ct. 2777, 73-L.Ed. 2d 534 (1982).

Furthermore, the Court held that the statute did not violate the Supreme Court directive of *Roe v. Wade*. The Court found the statute did not directly affect or impose a significant burden on a woman's right to an abortion. *Hickman*, 396 N.W. 2d at 14.

Similarly, 42 Pa.C.S.A. §8305 does not interfere with a woman's right to have an abortion. A woman is free to have an abortion, notwithstanding this Act. The Act does not impose a restriction upon, or authorize action which impedes a woman's right to an abortion, nor does it impose procedures which unduly burden the exercise of that right. Instead, the statute by its language merely extinguishes all causes of action arising from a claim that but for the improper conduct of a medical provider, a child would have been aborted prior to birth.

The Pennsylvania Wrongful Birth Statute is clearly distinguishable from the Spousal Consent Statute in *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 96 S.Ct. 2831, 49 L.Ed. 2d 788 (1976), cited by petitioner. In *Danforth*, this Court held that Missouri's requirement of spousal consent was unconstitutional because it granted a husband the right to prevent unilaterally, and for whatever reason, the effectuation of his wife's and her physician's decision to terminate her

pregnancy. *Danforth*, 428 U.S. at 69. Missouri, thus directly impaired by statute Plaintiff's right to decide whether or not to have an abortion.

Pennsylvania's Wrongful Birth Statute is clearly distinguishable where petitioner's freedom to decide is not impaired by a statute which denies her the right to bring an action against the physician who has negligently failed to advise her correctly regarding the health of the fetus. *See Hickman*, 396 N.W. 2d at 17. *See also Dansby v. Thomas Jefferson University Hospital*, 1993 W.L. 78740 (Pa. Super. 1993).

Petitioner's argument that Pennsylvania's Wrongful Birth Statute violates the Equal Protection Clause because it discriminates against women who choose to have an abortion must also fail. Such women do not constitute a suspect class. *San Antonio School District v. Rodriguez*, 411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed. 2d 16 (1973). This Court in *San Antonio* held that a suspect class is one:

> [S]addled with such disabilities, or subjected to such history of purposeful and unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.

Rodriguez, 411 U.S. at 28. Women who choose to have an abortion clearly do not constitute a "suspect class". *Id. See also, Maher*, 432 U.S. at 471.

Since 42 Pa.C.S.A. Section 8305 does not infringe upon a fundamental right or suspect class, it is not necessary for this state to have a compelling state interest in order to justify the statute. It is only necessary that the state have a rational basis in order for it not to violate the equal protection or the due process clauses of the

Fourteenth Amendment. *San Antonio School District v. Rodriguez,* 411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed. 2d 16 (1973).

By enacting Section 8305, the Pennsylvania legislature was concerned with the elimination of suits brought by children or other parents to recover damages for the failure to abort a child. The act itself is quite clear in its prohibition against wrongful birth and wrongful life causes of action. The intent of this act was stated by Senator Rocks during a debate within the Senate:

> This is the intent of what the wrongful birth and wrongful life legislation is about to stop a court engendered policy which views the birth of a child, be that child handicapped or otherwise, as a damaging event for which someone should be punished in order to prevent this quality of life ethic from becoming so pervasive that a handicapped child is routinely considered better off dead and of less value than what we could call a "normal child" and to prevent the practice of medicine, especially obstetrics and gynecology, from becoming coerced into accepting eugenic abortion as a condition for avoiding what are particularly wrongful birth lawsuits.

1988 Pa. Legis. Serv. 1961 (Purdon).

Additionally, the legislature provided four very persuasive reasons to support this change. First, to permit these lawsuits is to admit that birth can be evil and a cause of action. The legislators did not believe that a birth should be an evil, and felt that if such an admission were allowed, our society, as we know it, would cease to protect the interests of those who may be far less fortunate than others. Second, the legislators felt that to permit these lawsuits was both illogical and inconsistent. Every year, there is an increased

recognition of the rights of the handicapped, those who are not "normal". These include accessibility to transportation, accessibility to buildings, mainstreaming and education. By permitting these lawsuits, we would in essence be saying that the handicapped are entitled to these rights, yet they have no right to life.

Third, the legislators should never dictate to a doctor how to practice medicine. The existence of such lawsuits was doing just that. They were requiring doctors, against their will and their conscience, to practice recommending abortions. According to the words of our legislature this was "outrageous". Fourth, from a pragmatic standpoint, it is the presence of these lawsuits which is one of the main factors that have caused medical malpractice rates for obstetricians to skyrocket. The legislature recognized that these suits had to be curtailed if we are to be able to maintain adequate health care in the Commonwealth. See 1988 Pa. Legis. Serv. 2306 (Purdon).

It is clear that Pennsylvania has adopted a policy of promoting life over abortion and that the failure to abort an unborn child should never constitute a wrong. *Roe v. Wade* implies no limitation on the authority of the State to make a value judgment favoring childbirth over abortion. *Maher,* 432 U.S. at 474. *See also Webster,* 492 U.S. at 410.

Pennsylvania's Wrongful Birth Statute is rationally related to the legitimate state interest in recognizing the value of human life. Therefore, 42 Pa.C.S.A. Section 8305 should not be considered unconstitutional and Ms. James' petition for Writ of Certiorari should be denied.

II. The constitutionality of laws prohibiting wrongful birth actions is clear despite different holdings on the issue by the United States Circuit Court of Appeals for the 7th and 11th Circuits.

In *Robak v. United States,* 658 F.2d 471 (7th Cir. 1981), and *Campbell v. United States,* 962 F.2d 1579 (11th Cir. 1992), the United States Courts of Appeals for the 7th and 11th Circuits respectively, arrived at different holdings as to the question of whether a wrongful birth action is maintainable. In *Robak,* the 7th Circuit Court of Appeals held that an action for wrongful birth could be brought against a physician who failed to diagnose wife-Plaintiff's rubella, and failed to inform her of the potential danger to her fetus. Wife-Plaintiff alleged that she would have chosen to abort if she had been informed of such danger. *Robak,* 658 F.2d at 473.

In *Campbell,* the Court of Appeals for the 11th Circuit held that a wrongful birth action could not be brought against wife-Plaintiff's treating physician for failing to timely diagnose her pregnancy and administer an amniocentesis exam. Wife-Plaintiff alleged that if the diagnosis and exam were timely made, she would have learned of the genetic defect in her fetus before the end of the second trimester and would have terminated her pregnancy. *Campbell,* 962 F.2d 1581.

Petitioners argue that these different holdings by the Federal Appellate Courts in *Robak* and *Campbell,* leave an open question as to the constitutionality of wrongful birth statutes. An analysis of the *Robak* and *Campbell* cases demonstrates, however, that while the Federal Appellate Courts have arrived at different holdings as to the issue of the maintainability of wrongful birth actions, they do not conflict as to the issue of whether or not prohibition of such actions is constitutional. Indeed,

Robak did not even address the question of whether or not prohibition of wrongful birth actions violates a woman's constitutional rights under the 14th Amendment. *See Robak,* 658 F.2d at 471.

Both *Robak* and *Campbell* did, however, address the question of whether birth action could be maintained against the United States where the allegedly negligent medical providers in each case, worked for the government. To answer this question, the Federal Circuit Courts in *Robak* and *Campbell* were required under the Federal Tort Claims Act ("FTCA"), to apply the law of the state where the alleged tort occurred. *See Robak,* 658 F.2d at 474; *Campbell,* 962 F.2d at 1581.[1]

The conflicting holdings of *Robak* and *Campbell,* therefore, arose not because of a conflict in federal law, but rather due to a conflict in the respective state law applied in each case. The FTCA required that in determining whether a cause of action existed for wrongful birth in each case, it was necessary to apply the law that existed at the time and place (state) of the tort. *Id.* The Federal Appellate Courts in *Robak,* and *Campbell,* therefore, acted in harmony where they applied the proper respective state laws as required under the FTCA.

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[1] In *Robak,* because the alleged tort occurred in Alabama, the 7th Circuit looked to the law of that state. Because Alabama had never addressed the issue of an action for wrongful birth, the Court of Appeals turned to the law in Texas and Wisconsin, Alabama's sister states. Because these states permitted actions for wrongful birth, the 7th Circuit concluded that the law of the State of Alabama would also permit such an action. *Robak,* 658 F.2d at 474. In the absence of any direct precedent from the state involved, a Federal Court applying state law should consider decisions of its sister states on the same issue. *Id.* at 474.

This Court in *Martinez v. California*, 444 U.S. 277, 100 S.Ct. 553, 62 L.Ed. 2d 481 (1980), held that a state's interest in fashioning its own rules of tort law is paramount to any discernible federal interest. *Martinez*, 444 U.S. at 282. The constitution does not create a fundamental right to pursue specific tort actions. States may create immunities which effectively eliminate causes of action, subject only to the requirement that their action not be arbitrary or irrational. *Edelstein v. Wilentz*, 812 F.2d 128 (3d Cir. 1987). *See also Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 432-33, 102 S.Ct. 1148, 1155-56, 71 L.Ed. 2d 265 (1982). Petitioners concede in their brief before this Court that state legislatures enjoy wide latitude in regulating tort actions. (Petitioners' Brief, p. 8).

As discussed in Section I, *supra*, the Pennsylvania legislature had a legitimate interest in providing immunity from tortious liability to medical providers under its wrongful birth statute. This statute clearly does not violate the equal protection and due process clauses of the 14th Amendment where it does not entail state action which regulates or interferes with a woman's right to choose an abortion.[2]

---

[2] As noted, *Robak* did not even address the question of whether prohibiting a wrongful birth action violates a woman's constitutional rights under the 14th Amendment. *Campbell*, however did address this question and arrived at the same conclusion as the Pennsylvania Superior Court in the instant case, holding that the wrongful birth statute does not violate equal protection and due process rights where it does not involve state action infringing upon a woman's right to obtain an abortion. *Campbell*, 962 F.2d at 1582-1583.

Finally, the different holdings of the Federal Courts in *Robak* and *Campbell* do not weaken this constitutionality, where the Court of Appeals for the 7th and 11th Circuits respectively, merely applied the appropriate state law as required under the FTCA in each case. Petitioners' Writ of Certiorari requesting this court to clarify the allegedly "conflicting" federal opinions of *Robak* and *Campbell*, should therefore be denied, where no true conflict exists.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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RESPONDENT'S APPENDIX

Certified copy of Complaint filed by Petitioners against Respondent Wynne Cooper, M.D. in the Court of Common Pleas of Allegheny County, Pennsylvania

IN THE COURT OF COMMON PLEAS
OF ALLEGHENY COUNTY, PENNSYLVANIA

CIVIL DIVISION

No. GD 89-18962

LOUIS EDMONDS, a minor by TANEIKA JAMES, mother and natural guardian, and
TANEIKA JAMES, in her own right,

Plaintiffs,

vs.

WYNNE COOPER, M.D.,

Defendant.

Code: 007

Filed on behalf of: Plaintiffs.

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ALLEGHENY COUNTY

COMPLAINT IN CIVIL ACTION

1. At all times material, plaintiff, Louis Edmonds (plaintiff-child) was and is an individual, infant, male child, born to his mother, Taneika James and is presently residing with plaintiff-mother in Pittsburgh, Allegheny County in the Commonwealth of Pennsylvania.

2. At all times material, plaintiff-mother, Taneika James, was and is an individual residing in Pittsburgh, Allegheny County in the Commonwealth of Pennsylvania.

3. At all times material, defendant, Wynne Cooper, M.D. (Physician) was and is an individual physician licensed to practice medicine within the Commonwealth of Pennsylvania with her principal office at 7525 Forward Avenue, Pittsburgh, Allegheny County, Pennsylvania. Plaintiff believes and avers that defendant physician also operates out of the Alma Illery Clinic in Wilkinsburg. Defendant Physician, at all times, held herself out to plaintiff-mother as skilled and confident in the fields of obstetrics and gynecology.

4. Plaintiff-mother believes and avers that on or about June 8, 1988, she learned for the first time that she was pregnant. Plaintiff-mother was examined and followed by a certain physician or physicians who ordered the performance of a sonogram.

5. Plaintiff-mother believes and avers that an initial sonar or sonogram was performed on or about August 17, 1988. Based on the sonogram, the duration of plaintiff-mother's pregnancy was approximated at 16 weeks with an estimated date of confinement of February 5, 1989. Plaintiff-mother avers that the findings of this sonogram were essentially normal with no evidence of fetal abnormality.

6. Plaintiff-mother believes and avers that on or about October 10, 1988, plaintiff-mother was examined by defendant-Physician, wherein the defendant became plaintiff-mother's physician by choice. Plaintiff-mother believes and avers that the Physician desired the performance of a repeat sonogram and that defendant's Pre-Natal Flow Record indicates that a sonogram was to be scheduled.

7. On or about October 25, 1988, a second sonogram was performed upon plaintiff-mother. Plaintiff-mother had no reason to believe that the sonogram performed on October 25, 1988 differed from the sonogram taken in August, 1988 and at all times, plaintiff-mother believed that the sonogram showed the normal development of her child.

8. Plaintiff-mother believes and avers that she asked the Physician of the results of the sonogram and she was informed that the sonogram was normal. Plaintiff-mother believes and avers that defendant-Physician was not provided with the results of the October 25, 1988 sonogram and then later either forgot to request a report or forgot that the test had even been performed. As such, plaintiff-mother did not know or have reason to know of any fetal abnormality in October or November, 1988.

9. Plaintiff-mother believes and avers that the findings or results of the October 25, 1988 sonogram did in fact show a fetal abnormality. Plaintiff-mother avers that a high quality comprehensive study was performed on October 25, 1988 which demonstrated a cystic structure (porencephalic cyst) in the region of the hippocampus of plaintiff-child, which measured 1.9 x 2.1 x an uncertain height. At the time of the sonogram, plaintiff-child's compatible gestation age was 25.3 weeks with a range of 23.5 to 26.9 weeks.

10. On or about December 12, 1988, plaintiff-mother was again examined by defendant-Physician and a sonogram was scheduled for December 27, 1988 at West Penn Hospital. A sonogram was performed on December 27, 1988 which confirmed the presence of a porencephalic cyst, but enlarged since the previous sonogram.

11. Plaintiff-mother believes and avers that during the sonogram of December 27, 1988, two technicians or agents, servants or employees of the hospital indicated that they had observed something concerning the baby's brain. Plaintiff-mother requested additional information from the technicians, however, plaintiff-mother was told to discuss and review the results with her physician.

12. Plaintiff-mother avers that she attempted to discuss the sonogram with defendant at the next appointment on December 29, 1988 and requested that defendant determine whether or not the test was normal. It was at this time that plaintiff-mother was informed of the presence of a cyst on her child's head or brain and that she had not been informed of the presence of said cyst until her appointment with defendant-Physician on or about December 29, 1988. Plaintiff-mother was then referred to a genetic clinic for evaluation.

13. Plaintiff-mother believes and avers that defendant-Physician desired to schedule an amniocentesis for two weeks from December 27, 1988. However, plaintiff-mother's mother insisted upon an immediate amniocentesis and as such, one was performed on January 3, 1989.

14. Plaintiff-mother believes and avers as a result of the performance of the amniocentesis on January 3, 1989, plaintiff-mother was subjected to premature labor for approximately six hours wherein plaintiff-mother was

given medication to prevent the delivery of her child and cease contractions. Plaintiff-mother avers that she was not given any medications to reduce the pain and suffering she experienced while in premature labor on January 3, 1989.

15. Plaintiff-mother believes and avers that a second amniocentesis was performed on or about January 16, 1989, along with other diagnostic testing, due to the fact that the prior amniocentesis performed on January 3, 1989 was not accurate for diagnostic purposes. As such, plaintiff-mother was again subjected to an amniocentesis on January 16, 1989.

16. As a result of the amniocentesis or other diagnostic testing performed on January 16, 1989, plaintiff-mother was again subjected to the pain and suffering accompanying premature labor for an approximate eight hour period of time. Again, no medications to reduce the pain and suffering experienced in the premature labor were given to plaintiff-mother and medications were given to plaintiff-mother again to terminate the contractions and stop the labor or delivery of the child.

17. On or about February 12, 1989, plaintiff-mother went into labor and at approximately 10:00 p.m. required an epidural and the reactivation of the epidural three times. However, due to complications with the labor, plaintiff-child was delivered through Cesarean-Section. Subsequent to plaintiff-child's birth it was determined or diagnosed that plaintiff-child suffered from quadrageminal arachnoid cysts as well as hydrocephalus.

18. Plaintiff-mother believes and avers that a ventriculoperitoneal shunt was placed due to the enlarged ventricles of plaintiff-child. On or about March 17, 1989,

further surgical procedures needed to be performed wherein a left-sided quadrigeminal cistern arachnoid cyst to peritoneal shunt was inserted. Plaintiff-child was discharged on March 19, 1989.

19. Plaintiff-child has been subjected to additional surgical procedures, including but not limited to a procedure performed on April 14, 1989 wherein a new left sided VP shunt was placed by a physician. Plaintiff-mother believes and avers that further shunt revision or the placement of additional shunts have been performed since April, 1989 and continued periodic treatment and examination of plaintiff-child is required to continually rule out the possibility of infection. Plaintiff-mother believes and avers that additional surgical or other medical procedures or shunt revisions will be required throughout plaintiff-child's life with the associated everyday concern as to whether or not infection will set into plaintiff's child's brain or body.

20. As a direct and proximate result of the conduct of defendant as referred to above and the negligence particulars set forth below, plaintiff-mother sustained the following injuries and damages, all of which may be continuing in nature and character:

a. Plaintiff-mother has been subjected to much emotional pain, suffering, inconvenience, anxiety, distress, depression and confusion;

b. She was forced to give birth to a child who would require extensive medical care throughout the child's life;

c. She was subjected to the physical and emotional pain, suffering, inconvenience and distress associated with at least two premature labor incidents, as well as associated with the labor and delivery of her child;

d. Plaintiff-mother was subjected to an unnecessary surgical procedure with associated risks and complications in the delivery of her child;

e. Plaintiff-mother was not given her rightful choice as to whether or not to terminate the pregnancy;

f. Plaintiff-mother had to completely alter her lifestyle due to the birth of said child and the extensive medical care and treatment required and which will be required.

g. Plaintiff-mother must live, day by day, with the reality and fear that her child's life expectancy is guarded;

h. Plaintiff-mother has lost the ability to enjoy a normal lifestyle with her child and has been and will be required to expend sums of money for past, present and future medical care for the child.

i. Plaintiff-mother has lost the ability to go about and enjoy her normal lifestyle subsequent to the birth of her child and will be unable to pursue the future development of her lifestyle, or such further development of it may be delayed.

21. As a direct and proximate result of the conduct of defendant as referred to above and the negligent particulars set forth below, plaintiff-child sustained the following injuries and damages, all of which may be continuing in nature and character:

a. Plaintiff-child has been subjected to much emotional and physical pain, suffering, inconvenience, anxiety and distress;

b. Plaintiff-child was subjected to premature labor on two separate occasions while in plaintiff-mother's womb, which created additional physical pain, suffering, inconvenience and distress;

c. Plaintiff-child was carried full term and was delivered on or about February 13, 1989 with severe fetal abnormalities and complications;

d. Plaintiff-child was subjected to many necessary surgical procedures with associated risks and complications subsequent to the delivery of plaintiff-child which include, but is not limited to the placement of shunts in his brain;

e. Plaintiff-child will in the future be subjected to the risks and complications associated with the surgery required to treat the condition from which he suffers and the replacement of shunts periodically through the remainder of his life;

f. Plaintiff-child has been and will be subjected to the risks and complications of infection, seizures and other disabilities which may cause him future injuries and damages and death;

g. Plaintiff-child has lost and will never gain the ability to enjoy a normal lifestyle and he will be required to expend or his guardian will be required to expend sums of money for past, present and future medical care required for plaintiff-child;

h. Further surgical procedures will be required upon plaintiff-child with associated physical and emotional pain, suffering, inconvenience, distress, anxiety, embarrassment and humiliation;

i. Plaintiff-child has sustained a loss of life expectancy and a loss of potential earning capacity.

COUNT I—TORT
TANEIKA JAMES V. WYNNE COOPER, M.D.

22. The allegations set forth in paragraphs 1 through 21 above are hereby incorporated by reference into Count I of this Complaint as though the same were to be repeated at length herein.

23. At all times material, defendant-Physician had a duty of care to plaintiff-mother and to the fetus within her, which entailed the following:

a. To verify the sonogram of October 25, 1989 had been performed;

b. To request a copy of the report of the findings of the sonogram taken October 25, 1988;

c. To determine whether a report had been sent by the hospital or received by any of defendant's offices;

d. To use all available means to determine the results of the October 25, 1988 sonogram;

e. To inform plaintiff-mother of the results of the October 25, 1988 sonogram in a timely manner; and

f. To provide accurate information to plaintiff-mother on the condition of her unborn child to enable plaintiff-mother to make informed decisions on all possible alternatives.

24. Defendant breached all of the above-mentioned duties of care to plaintiff-mother, and defendant's conduct, actions or omissions were negligent and careless in the following particulars:

a. In failing to inform plaintiff-mother of the findings of the October 25, 1988 sonogram;

b. In failing to request a report from the hospital which performed the October 25, 1988 sonogram;

c. In forgetting that defendant had ordered the sonogram for October 25, 1988 and thereby forgetting that a report existed;

d. In failing to check with the hospital which performed the sonogram for the results of the sonogram;

e. In failing to discuss in a timely manner with plaintiff-mother the results, alternatives, risks and complications associated with the results of the October 25, 1988 sonogram;

f. In failing to determine whether or not a report had been sent by the hospital or received by any of the offices in which defendant practices out of;

g. In failing to use all available means to learn in timely manner the results of the October 25, 1988 sonogram;

h. In otherwise failing to exercise that degree of care due and owing to plaintiff-mother under the circumstances;

i. By informing plaintiff-mother that the results of the October 25, 1988 sonogram were normal;

j. In the alternative, if defendant had received in a timely manner, the report of the October 25, 1988 sonogram, then in failing to permit plaintiff-mother ample opportunity or time to determine whether to abort or terminate the pregnancy upon receiving information on the fetal abnormality;

k. In knowing or having reason to know that plaintiff-mother's child had a fetal abnormality and in failing to inform plaintiff-mother immediately.

25. As a direct and proximate result of the negligent or careless conduct of defendant as set forth above, plaintiff-mother has sustained those injuries and damages set forth in paragraphs 14, 15, 16, 17 and 20 above.

WHEREFORE, plaintiff-mother hereby demands judgment in her favor and against the defendant in an amount in excess of $20,000.00 and in an amount in excess of the jurisdiction of the Arbitration Division of the Court, plus costs.

COUNT II—TORT
LOUIS EDMONDS V. WYNNE COOPER, M.D.

26. The allegations set forth in paragraphs 1 through 25 above are hereby incorporated by reference into Count II of this Complaint.

27. At all times material, defendant had the duty of care to the plaintiff-child wherein said duty of care is set forth in paragraph 23 above.

28. Defendant breached all of the above-mentioned duties of care to plaintiff-child and defendant's conduct, actions or omissions were careless in the particulars which are set forth in Count I of the Complaint.

29. As a direct and proximate result of the negligence or carelessness of the defendant, plaintiff-child has sustained those injuries and damages as set forth in paragraphs 18, 19 and 21 above.

WHEREFORE, plaintiff-child hereby demands judgment in her favor and against the defendant in an amount in excess of $20,000.00 and in an amount in excess of the jurisdiction of the Arbitration Division of the Court, plus costs.

Respectfully submitted,

MARK B. ARONSON
Mark B. Aronson

BRUCE S. GELMAN
Bruce S. Gelman

§4904. Unsworn falsification to authorities

(a) **In general.**—A person commits a misdemeanor of the second degree if, with intent to mislead a public servant in performing his official function, he:

(1) makes any written false statement which he does not believe to be true;

(2) submits or invites reliance on any writing which he knows to be forged, altered or otherwise lacking in authenticity; or

(3) submits or invites reliance on any sample, specimen, map, boundary mark, or other object which he knows to be false.

(b) **Statements "under penalty."**—A person commits a misdemeanor of the third degree if he makes a written false statement which he does not believe to be true, on or pursuant to a form bearing notice, authorized by law, to the effect that false statements made therein are punishable.

(c) **Perjury provisions applicable.**—Section 4902(c) through (f) of this title (relating to perjury) applies to this section.

1972, Dec. 6, P.L. _____, No. 334, §1, eff. June 6, 1973.

VERIFICATION

Now comes Taneika James, plaintiff-mother in the civil action at which the foregoing document is intended to be filed of public record, who verifies that the facts set forth in the foregoing Complaint in Civil Action are true and correct to the best of his/her knowledge, information and belief. This verification is made subject to the penalties of 18 Pa. C. S. §4904, relating to unsworn falsification to authorities, which provides for criminal penalties if a person with intent to mislead makes a written false statement which he/she does not believe to be true.

Date: April 13, 1990 TANEIKA JAMES

Filed: Apr 17, 1990, 9:31 PM

(SEAL(
CERTIFIED FROM THE RECORD
MICHAEL T. COPRA
Prothonotary

MARTHA CLOUER
Deputy